

(29,017)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 467.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE  
OF NEBRASKA, AMOS THOMAS, PERSONALLY AND AS  
AGENT AND REPRESENTATIVE, ETC., *ET AL.*, PETI-  
TIONERS,

*vs.*

A. J. HERTZ AND JOHN I. LEVIN, AS RECEIVERS OF THE  
LION BONDING AND SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT.

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<sup>a</sup> Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1922, of said Court, before the Honorable Kimbrough Stone, Circuit Judge, and the Honorable Jacob Trieber and the Honorable Thomas C. Munger, District Judges.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,  
*Clerk of the United States Circuit Court of  
Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the thirtieth day of September, A. D. 1921, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. J. Hertz, et al., as Receivers, etc., were Appellants, and the Lion Bonding and Surety Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, is in the words and figures following, to-wit:

1 In the District Court of the United States Within and for the District of Nebraska, Omaha Division.

Be it remembered, That on the 6th day of September, A. D. 1921, a Bill of Complaint was filed in the Clerk's office of said District Court, which said Bill of Complaint is in words and figures following, to-wit:

## EXHIBIT "1."

*Bill of Complaint.*

In the District Court of the United States for the District of Nebraska,  
Omaha Division.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding  
and Surety Company, Complainants,

vs.

LION BONDING AND SURETY COMPANY, E. R. GURNEY, H. C. LEIGH,  
E. P. McDonald, And F. Brown, Phil. H. Kohl, Chas. C. Brandt,  
F. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Depart-  
ment of Trade and Commerce of the State of Nebraska, and Amos  
Thomas, Personally and as the Agent and Representative of the  
Department of Trade and Commerce of the State of Nebraska, and  
W. A. Robinson, Jr., Defendants.

To the Honorable the Judges of the above-named court, in equity  
sitting:

The complainants herein respectfully exhibit to the court, this,  
their bill of complaint against the above named defendants, and  
respectfully represent and show to the court:

## I.

That the complainants and each of them at all of the times and  
dates herein mentioned were and at the time of exhibiting this bill  
of complaint are citizens of the State of Minnesota, and during all  
of said times and dates and for many years last past, the defendant  
Lion Bonding and Surety Company was and is a corporation organ-  
ized and existing under and by virtue of the laws of the State of  
Nebraska, and during all said times was, and at the time of exhibit-  
ing this bill of complaint, it is a citizen of said State of Nebraska,  
and is hereinafter referred to as the defendant corporation; that the  
defendant E. R. Gurney, was and is the president of the de-  
2      fendant Lion Bonding and Surety Company; that H. C.  
Leigh, E. P. McDonald, Dan F. Brown were and are the Vice-  
presidents of the defendant company; that Phil H. Kohl was and is  
the Treasurer of the defendant company; that Charles C. Brandt  
was and is the Secretary of the defendant company; and that the  
defendants Cowdrey and Mackay were and are the assistant Treasurer  
and assistant Secretary respectively of the defendant company; that  
the defendant W. B. Young was and is chief of the Bureau of In-  
surance of the State of Nebraska, and at the time of exhibiting this  
bill of complaint, these defendants and each of them were and are  
citizens of the State of Nebraska; that the defendant Amos Thomas,  
at all the times and dates mentioned in this bill and as is hereinafter

more particularly alleged, was and is the agent and representative of the defendant, the Department of Trade and Commerce of the State of Nebraska, and was and is in the immediate custody and direction of the property of said Lion Bonding and Surety Company under the direction of said Department as is hereinafter more particularly stated, and during all of said times and dates and at the time of the exhibiting of this bill of Complaint, the defendant Thomas was and is a citizen of the State of Nebraska.

## II.

That on the 2nd day of May, 1921, A. H. Karatz duly filed in the District Court of the United States for the District of Minnesota, Fourth Division, his certain bill of complaint verified by his oath, a true copy whereof is hereto annexed, marked Exhibit A, and made a part of this complaint; that upon the filing of said bill of complaint, and on May 2, 1921 said court duly made and entered its order appointing these complainants receivers of all the property of every kind of the defendant Lion Bonding and Surety Company, and in and by said order, these complainants as such receivers were authorized and directed to take immediate possession of all the property of said defendant, wherever situated and to institute and prosecute such suits as in their judgment may be necessary to secure possession and protect the property of said defendant corporation, so vested in them in and by the terms of said order, a true and correct copy of which said order is hereto annexed, marked Exhibit B, and made a part of this complaint.

That upon the entry of said order so appointing these complainants as receivers of the property and effects of the defendant Lion Bonding and Surety Company, and upon the 4th day of May, 1921, they duly executed and filed in the office of the clerk of said court their bond in the penal sum of \$20,000.00 as required by said order conditioned for the faithful discharge of their duties as such receivers, which said bond was duly approved by said court, and thereupon these complainants duly qualified and entered upon the discharge of their trust as receivers of said defendant corporation and are still acting as such receivers under said appointment.

That upon the appointment and due qualification of these complainants as such receivers as aforesaid, A. H. Karatz in that action and in accordance with the requirements of Section 56 of the Judicial Code, U. S. Compiled Statutes 1916, Section 1038, caused to be filed with the Clerk of the District Court of the United States for the several districts within the eighth circuit in which the property of the defendant corporation was located, a certified copy of the bill and order of appointment as follows:

In the office of the Clerk of the United States District Court for the district of Nebraska, Omaha division, on the 11th day of May, 1921; in the office of the clerk of the United States District Court for the northern district of Iowa, May 11th, 1921; in the office of the clerk of the United States District Court for the eastern

district of Missouri, May 11th, 1921; in the office of the clerk of the United States District Court for the district of Utah, May 12th, 1921; in the office of the clerk of the United States District Court for the district of Kansas, on May 12th, 1921; in the office of the clerk of the United States District Court for the district of Nebraska, on May 12th, 1921; in the office of the clerk of the United States District Court for the district of Wyoming, on May 11th, 1921.

That thereafter such proceedings were duly had resulting in the appointment of these complainants as ancillary receivers of all of the property, of every kind and nature, wherever situated, of the defendant Lion Bonding and Surety Company in the following districts:

Western District of Oklahoma, eastern district of Oklahoma, southern district of California, northern district of California, Oregon, North Dakota, South Dakota, Michigan, eastern district of Washington, western district of Washington, eastern district of Illinois, Idaho.

That the assets of the defendant corporation owned and possessed by it at the time these complainants were so appointed receivers, situated in the State of Nebraska, then and now, so far as these complainants have been able to ascertain, consists of cash, mortgages and other securities, bills receivable, real estate, stocks and bonds of the total amount of approximately \$1,858,008.55.

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## III.

That before the appointment of these complainants as receivers of the property and assets of the defendant corporation, the defendant, the Department of Trade and Commerce of the State of Nebraska had duly filed and presented to the District Court of the State of Nebraska in and for the County of Douglas in said state, its verified petition, a true copy of which is hereto annexed, marked Exhibit C, and made a part of this complaint.

That upon the filing and exhibiting of said petition the defendant corporation filed its answer thereto, a true copy of which is hereto annexed, marked Exhibit D, and made a part of this complaint; that, thereupon, the said Nebraska Court made and entered its order directing the defendant department to take possession of the assets and property of the said defendant corporation for the purpose of administering, conducting and carrying on the business of the company, a true copy of which order is hereto annexed, marked Exhibit E and made part of this complaint.

That pursuant to said order, the defendant department did take into its possession the books of the defendant corporation, its cash on hand, securities, etc., and said department thereupon appointed and designated the defendant Thomas as its agent and representative to act for it in the supervision, control and management of the business of said corporation, and he entered upon the performance of the trust so imposed in it and said defendants and said Thomas, with the aid and assistance of the other defendants herein, who are the officers of the defendant corporation as hereinbefore stated, and under the direction and control of the defendant Hart as the managing officer



of said department have, notwithstanding the appointment of your receivers, wrongfully and unlawfully assumed to continue in the control, management and direction of the business of the said defendant corporation and its properties to the exclusion of these complainants as the receivers of said defendant corporation.

These complainants further show that after they had filed in the office of the clerk of the District Court of the United States in various districts thereof as hereinbefore alleged verified copies of the order appointing them receivers of said defendant company, and on or about the 15th day of May, 1921, the defendant corporation, under the provision of Section 56 of the Judicial Code, duly presented to the United States Circuit Court of Appeals for the eighth circuit, an ap-

5 plication for the disapproval by said court of the order appointing the receivers herein as aforesaid, in so far as said order of appointment had extraterritorial effect by virtue of the filing of certified copies of said order as hereinabove set forth, and therein set forth the facts and circumstances relating to the possession by said defendant department and said Thomas of the property and assets of said defendant corporation. That upon the filing of said petition, the said Circuit Court of Appeals duly directed that the same be heard before the court on the 21st day of May, 1921, and under the direction of the court, these complainants as receivers were given notice of the filing of said application and required to attend and show cause, if any they had, why such application should not be granted, and they did appear on said hearing accordingly, and the defendant company appeared before said court upon said hearing and the matter was fully argued, heard and determined, and thereupon and on May 31, 1921, the said court made and filed its order denying said application with the qualification: "That the right of said receivers to the possession of such of the property of said company as is situated in the district of Nebraska shall be subject to such right of possession thereof in the Department of Trade and Commerce as had accrued to it, under proceedings in the district court of Douglas County in that state, when the right of the receivers arose under the laws of the United States." A true and correct copy of said order is hereto annexed, marked Exhibit F, and made a part of this complaint.

That the sole right of possession in the defendant department, which had accrued to it under the proceedings in the district court of Douglas County in that state, referred to it in said order, was the right and authority granted by the order of that court made on April 12, 1921, hereinbefore set forth, to the temporary possession of the property of the defendant corporation for the conduct of its business in accordance with said order, with the right to list and inventory the said property.

That subsequent to the appointment of these complainants as receivers of said defendant corporation, and while the said petition so filed by the defendant corporation in the Circuit Court of Appeals was still pending, and on May 28, 1921, the defendant department filed in the district court of the state of Nebraska in and for the

county of Douglas its further petition praying for an order authorizing the winding up and liquidation of the business of the corporation under its direction, and that the agents and special employees therefore engaged by said department to conduct the business of the corporation be continued in such employment for the purpose of liquidation; a true copy of which petition is hereto annexed, marked 6 Exhibit F, and made a part of this complaint.

That contemporaneously with the filing of said petition, the defendant corporation, acting through the defendant McDonald as its attorney, filed in said Nebraska Court, its answer to said petition, a copy of which is hereto annexed, marked Exhibit G and made a part of this complaint; that thereupon — the same day, said Nebraska court made and entered its order in said proceedings, a copy of which is hereto annexed, marked Exhibit H, and made a part of this complaint.

These complainants further show that the defendant- herein assert and claim that under the orders made by the said Nebraska court, they are vested with the title of all of the assets of the defendant corporation to the exclusion of any right thereto in these complainants; that they assert the right to marshal the assets of said defendant; to adjust and pay all claims presented against said defendant; to liquidate the securities of the defendant; to pay for legal aid and other employees so employed by said defendants; to pay the salary of the defendant Thomas at the rate of \$1,000.00 per month, and to pay other expenses, which said defendants claim to be necessary to carry on the business and affairs of said defendant; that these complainants have protested against the usurpation of the right of said defendants to continue in the possession of the property of said defendant company, and have demanded of said defendants all of the assets in their possession, including the books and records of said corporation, but that they, and each of them have refused and wrongfully and unlawfully do refuse to surrender and deliver said assets, books, files and records or any portion thereof to these receivers, and deny the right of these complainants as such receivers to any portion or control of the property or assets of the defendant corporation so in the hands of said defendants, and claim and insist upon their asserted right to administer the assets of the defendant company including the sale of its assets and the payment from the proceeds of the expense of administration, including a salary of \$1,000.00 a month to the defendant Thomas for his services as the agent of said department, which amount has been actually fixed and allowed to him by an unauthorized order of said Nebraska court, a copy of which order is hereto annexed, marked Exhibit I, and made a part of this complaint: and the said defendant department and the other defendants [at] its agents and representatives, with the approval of said Nebraska Court, assume the right to pay out of the funds of the

7 defendant company, coming into their hands such claims and demands against the defendant company as may be presented to and allowed by them, and for this purpose to dispose of the property of the defendant company, to liquidate the securities, to employ agents and attorneys and pay them out of the

funds of said defendant to the detriment and loss of the creditors residing in other states outside of the State of Nebraska, and claim and assert, that notwithstanding the appointment of these complainants as such receivers, their right to continue so to do to the exclusion of the creditors of the defendant corporation residing in other states and to the complainants herein under their said appointment; and have denied, and do deny these complainants any access to the files, books and records of said defendant corporation, and have concealed and do conceal and secrete all such assets, moneys, books and records of said defendant corporation so that these complainants are unable to secure control thereof or any inspection or use thereof, and by their said wrongful acts have prevented and do prevent these complainants from discharging the duties of the trust reposed in them by virtue of their appointment as such receivers; that the complainants without an examination of the books and records of said defendant corporation are unable to obtain any inventory or description of its properties or assets and without such inventory or description, they are and will be unable to bring the necessary actions for the recovery thereof; that the defendant department has, as these complainants are informed and believe, collected large sums of money from the debtors of the defendant corporation, but refuse to give to these complainants any statement thereof, or where it is kept, but as hereinbefore stated, they have secreted and concealed the same from these complainants, who have no means of ascertaining the amount thereof, or the names or addresses of the persons from whom received, or the amount or character of the demand of the defendant corporation under which such payment was made, and the defendants refuse to permit them to examine the books and records of the defendant company, and refuse to furnish them with information regarding the property and assets of the defendant corporation, and refuse them the possession thereof.

These complainants further show that included in the assets of the defendant company is and was at the time of their appointment as receivers, a trust fund, consisting of bonds, mortgages and other securities amounting in value upwards to Two Hundred Thousand Dollars, which was theretofore deposited by the company with the insurance

department of the state of Nebraska as a guarantee fund to secure the payment of its obligations under the various forms of insurance contracts written by said company, and the defendants herein contend and claim that this fund is applicable in the first instance only to the payments of the debts and obligations of the defendant company to those of its creditors holding its policies issued in that state, and that such creditors are entitled to priority in the payment of the moneys realized from that fund to the exclusion of the other general creditors of the defendant company, and these complainants are informed and believe that if the administration of the estate of the defendant company is left in the hands of the defendant department, this trust fund will be thus treated and disposed of, and that the Nebraska court will sustain and sanction the attitude of the defendant department as to the

disposition of that part of the assets of the defendant company to the exclusion of its other general creditors.

These complainants further show that it is essential to the performance of their trust, that they have the possession of the books and records of the defendant corporation in order that they may ascertain therefrom the names of its creditors, and such further information as these books and records may give as to the circumstances and the foundation of each particular claim, and it is essential to the administration of their trust that they be appraised as to the place of deposit of the moneys of the corporation, which have been deposited in the bank and the amount of such deposit.

These complainants further show that acting upon the petition and recommendation of the defendant department, the Nebraska court hereinbefore referred to has assumed to authorize the compromise and settlement of various claims and demands owing to the defendant corporation by various persons in the state of Nebraska and elsewhere, and to grant orders directing the selling and disposing of its property and the payment from the proceeds thereof of the debts of the defendant company approved and allowed in that court and none other, and furthermore, the defendants threaten to institute suits in the name of the defendant corporation and in the name of the defendant department in the state courts in the state of Nebraska and elsewhere for the recovery of moneys due the defendant corporation from its various debtors and for the recovery of the possession of the assets and properties of the corporation, a more particular description of which is to these complainants unknown, and apply the moneys thus obtained to the payment only of claims proved and established in said Nebraska court, and to the entire

9 exclusion of the claims filed with these complainants as receivers under their said appointments and they will carry out these threats unless restrained by the order of this court; and these complainants will be put to the necessity of intervening in said various suits so brought by said department so far as they may obtain knowledge of the pendency thereof, and this will result in a conflict in each of these cases between these complainants and the defendants of priority to right to administer the affairs of the defendant corporation and in a conflict of superior jurisdiction between the District Court of the United States for the district of Minnesota, and the district court of the State of Nebraska in and for the county of Douglas in that state as to the priority of right to such administration, and this controversy and right of jurisdiction and priority of right to administer should be tried and determined in an orderly manner, in a direct suit brought for that purpose in a court of general equity jurisdiction in which that issue alone is presented and which are the necessary parties and none other are before the court; and under the circumstance disclosed in this complaint and for the reasons hereinbefore stated, and other reasons, which readily will present themselves to this court, these complainants have no speedy and adequate remedy in the usual course of the law.

Wherefore these complainants pray that by the order and decree of this court, it be adjudged and determined that as against the de-

defendants in this suit, the plaintiffs as receivers of the defendant corporation, have priority of right and the exclusive right to the marshalling of the assets of the defendant corporation and the liquidation of its affairs, and that as against the defendants, they are entitled to the possession of the books and records of the defendant corporation and all of its property and assets, and that the defendants have no right to the possession or control thereof either for the administration of the affairs of the defendant corporation under the direction of the Nebraska court or otherwise, and that they and each of them be enjoined and restrained from secreting, concealing or otherwise disposing of any of the assets of the defendant, Lion Bonding and Surety Company, and from interfering in any manner with the exercise of these complainants' right to the possession and control of the property and assets, and the books and records of the said defendant corporation, and from in any manner interfering with or disposing of any of said property, or from bringing any suit at law or in equity against any person for the recovery of any debt due to the defendant corporation, or for the foreclosure of any mortgage or other lien held by said defendant upon the property of another, or for the recovery of the possession of any property of the said defendant corporation, or from interfering in any manner with the management, control or possession of any of its assets, or the possession of its books and records, and that they be required to surrender the same to these complainants as such receivers, and that these complainants have such other and further relief as to the court shall seem just and equitable.

SANBORN, GRAVES & ORDWAY,  
*Attorneys for Complainants.*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

A. J. Hertz and John I. Levin being first duly sworn upon oath, doth each for himself depose and say that he is the complainant in the above entitled suit; that the foregoing bill of complaint has been read by them and that they know the contents thereof, and that the same are true of their own knowledge except as to the matters which are therein stated on information and belief, and as to those matters they believe it to be true.

A. J. HERTZ.  
JOHN I. LEVIN.

Subscribed and sworn to before me this 29th day of August, 1921.

[SEAL.]

BRUCE W. SANBORN,  
*Notary Public, Ramsey County, Minn.*

My commission expires, Oct. 26, 1925.



## EXHIBIT "2."

*Bill of Complaint.*

In the District Court of the United States for the District of  
Minnesota, Fourth Division.

In Equity.

A. H. KARATZ, Complainant,

vs.

LION BONDING & SURETY COMPANY, a Corporation, Defendant.

To the honorable the Judges of said court, in equity sitting:

Your orator above-named, suing on behalf of himself and also all  
other parties similarly situated who may desire to become  
11 complainants herein, brings this as his bill of complaint  
against the Lion Bonding & Surety Company, a corporation,  
the defendant above-named, and thereupon complains and says:

I.

That your orator, A. H. Karatz, is a resident and citizen of the  
State and District of Minnesota and resides in the City of Minne-  
apolis in the Fourth Division thereof.

II.

That the defendant is an insurance corporation organized under  
the laws of the State of Nebraska and has been admitted to do busi-  
ness in the State of Minnesota, and that in pursuance of such au-  
thority, it has written a large amount of liability insurance and has  
outstanding in the state policies of liability and theft insurance and  
obligations upon bonds which it has signed as sureties for the per-  
formance of construction contracts, fidelity bonds and other obliga-  
tions in an amount exceeding One Hundred Thousand Dollars  
(\$100,000.00), and that it has numerous agents within this District  
and within the State of Minnesota for the conduct of its business.

III.

That during the year of 1920, for value received, and for a valu-  
able consideration, it issued and delivered a certain policy of in-  
surance to the Cleveland Wrecking & Contracting Co., a corporation  
organized and doing business in the State of Minnesota and doing  
business in the City of Minneapolis in said State, by the terms of  
which it insured a certain automobile against theft in excess of the  
sum of Two Thousand One Hundred Dollars (\$2,100.00), which



said automobile was subsequently stolen, and the defendant, being duly notified thereof, placed the adjustment of the claim of said Cleveland Wrecking & Contracting Company, for the loss of said automobile in the hands of their business agency, Messrs. Peilen & Peilen in the City of St. Paul, Minnesota for adjustment, and that an adjustment was had and it was found that the Cleveland Wrecking & Contracting Co. was entitled to receive from the defendant herein on account of the loss of said automobile, the amount of Two Thousand One Hundred Dollars (\$2,100.00), and thereupon said Peilen & Peilen drew their draft in payment of the loss so sustained directly to the defendant at its principal place of business in the City of Omaha, State of Nebraska, which draft is as follows:

"Draft No. 2075.

St. Paul, Apr. 9th, 1921.

Payable to the order of Cleveland Wrecking Co. \$2,100.00 Twenty One Hundred no/100 Dollars, Value received, in payment of loss Fidelity, Burglary, Collision, Surety, Liability, Plate Glass, Property Damage, Theft X, Accident, Health. Indicate kind by X Mark.

Claim No. —. Policy No. 13343. Principal Assured, Cleveland Wrecking Co.

To Lion Bonding & Surety Co., Omaha, Nebraska.

Payable through Omaha National Bank.

PEILEN & PEILEN.

No Protest.

No good unless release and receipt on reverse side hereof is signed.

No protest. 17-99.

Endorsed by Cleveland Wrecking & Contracting Co., by C. H. Rose, Claimant.

Endorsed by A. H. Karatz.

#### IV.

That for value received, the said Cleveland Wrecking & Contracting Co. endorsed and transferred this draft to the complainant herein, and thereupon said complainant caused said draft to be forwarded through the Federal Reserve Bank to a bank in the City of Omaha, Nebraska, for presentation and collection, and that the draft was thereafter duly presented for payment and that payment thereon was declined for the reason that the defendant did not have sufficient funds to pay the same, and that said draft was thereupon returned to the complainant herein without payment and remains wholly unpaid, although payment thereof has been duly demanded.

#### V.

Your complainant further alleges that, although the defendant has its principal office or place of business in the City of Omaha, Nebraska, from which City all of the financial affairs of said Company

have been and now are being directed and administered, said defendant is the owner of and is possessed of a large amount of personal property within the District of Minnesota, consisting of premiums due from its policy holders, moneys and credits in the hands of its local agents and in banks, and other property, the exact nature and character of which is to this complainant unknown, and which this complainant alleges to be of the value of at least Twenty Thousand Dollars (\$20,000.00).

## VI.

Your complainant further represents and states to the Court that said defendant has past due liabilities amounting to the sum of Three Hundred Seventy Seven Thousand Seven Hundred and Ninety Dollars (\$377,790.00), which said defendant is wholly unable to pay and that said defendant has been denied the right to continue to do business in the States of Minnesota and Nebraska by the Insurance Commissioners of said States; that it has ceased to be a going concern, and that by reason of the insolvency of said defendant, there is great danger of the property being wasted and dissipated through loss of control thereof by the officers of said defendant and litigation ensuing or about to ensue upon the large amount of unpaid claims.

## VII.

Your complainant further shows that he is informed and believes the same to be true, that the cash on hand and accounts and bills receivable of the defendant corporation are insufficient to pay its indebtedness due and past due, and that various creditors are threatening to sue the Company and collect their claims by separate executions, attachments and other proceedings, unless the Court will take the property of said defendant into its custody and appoint receivers for the purpose of converting the assets of the Company into money and distributing the same among the creditors of said defendant.

## VIII.

That this action is commenced for the purpose of closing up the business of the said defendant and causing a just and fair distribution of the property of said defendant to be made among its creditors.

## IX.

That the amount in controversy and in dispute herein, exclusive of interests and costs, exceeds the sum and value of Three Thousand Dollars (\$3,000.00).

## X.

That the defendant herein at all the times and dates herein mentioned has been and now is a citizen of the State of Nebraska.

Wherefore, and in as much as your orator is remediless in the premises at and by the strict rules of the common law, and can have relief only in a Court of Equity where matters of this nature properly cognizable and reviewable, they file this bill on behalf of themselves and all others in like relation to the said property, and pray:

That the amount due the complainant and all other creditors herein from the defendant be adjudicated and determined and that the amount due complainant be adjudged a first lien upon all the assets of defendant in the State of Minnesota;

That for the purpose of protecting the general public, as well as the creditors and stockholders of said defendant corporation and in order to preserve the property of said defendant and to prevent the further distribution thereof by separate executions, attachments, sequestration and other proceedings, the occurrence of which will be unavoidable, your orator prays that this Court will forthwith appoint one or more receivers of all of the property and assets owned and controlled by the defendant, including the property and assets of every kind and description and wherever situated with authority to collect and manage the same and to apply the balance ratably to the payment of all the debts and obligations of the said defendant, and that in default of the payment of said obligations, the Court will provide for the sale and disposition of the assets of the defendant as a whole or otherwise as the Court may determine.

That the defendant and its officers, managers, superintendents, agents and employees be forthwith required to deliver up the possession of all and singular each and every part of said property over which said receivers shall be appointed wherever situated; also books of account, office vouchers and papers in any way related to the business of the defendant and that an injunction issue restraining perpetually and during the pendency of this suit the defendant and its officers, directors, managers, superintendents, agents and employees and all other persons whomsoever from interfering in any way whatever with the possession and control of such receiver of receivers over any part of the said property;

That your Honor may grant to your orator writ of subpoena directed to the defendant, Lion Bonding & Surety Company, commanding it at a certain time and under the penalty  
15 therein to be named, personally to be and appear before this Honorable Court then and there to answer all and singular the matters aforesaid, but without oath (all answers under oath being hereby expressly waived) according to the practice and rules of this Court, and to stand and abide by and perform such order, direction and decree as shall be made herein and as to Your Honor shall seem equitable and just, and that your orator shall have such other and further relief as to the Court shall seem proper and as may be necessary to enforce the rights and equities of your orator and all other creditors and stockholders of the defendant corporation.

SANBORN, GRAVES & ORDWAY,  
*Solicitors for Complainant, Saint Paul, Minnesota.*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

A. H. Karatz came before me personally, and being by me duly sworn, did say that he is the complainant in the above entitled suit; that the foregoing bill of complaint has been read by him, and that he knows the contents thereof and that the same are true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

A. H. KARATZ.

Subscribed and sworn to before me this 29th day of April, 1921.  
[Notarial Seal.] A. J. HERTZ,

*Notary Public, Hennepin County, Minn.*

My commission expires July 9, 1925.

Endorsed: Filed in the U. S. District Court, District of Minnesota, on May, 2, 1921.

UNITED STATES OF AMERICA,  
*District of Minnesota,*  
*Fourth Division, ss:*

I, Charles L. Spencer, Clerk of the United States District Court for the District of Minnesota, do hereby certify that I have carefully compared each of the copies, attached to this certificate, with its respective original, which is in my custody as such Clerk, and  
16 that each of the said copies is a full, true, and correct transcript from such original and of the whole thereof, and of the endorsements thereon.

In testimony whereof, I have hereunto set my official signature as the Clerk aforesaid and affixed the seal of said Court at Minneapolis, in the Fourth Division of said District this 17th day of June, A. D. 1921.

[Seal U. S. Dist. Court, Fourth Division, Dist. of Minnesota.]

CHARLES L. SPENCER,  
*Clerk,*

By LEMPI N. LAHTINEN,  
*Deputy Clerk.*

EXHIBIT "3."

*(Order Appointing A. J. Hertz et al. Receivers of the Lion Bonding & Surety Company.)*

In the District Court of the United States for the District of Minnesota, Fourth Division.

In Equity.

A. H. KARATZ, Complainant,

vs.

LION BONDING & SURETY COMPANY, a Corporation, Defendant.

Upon reading and considering the petition and motion of the complainant herein and the verified bill of complaint in this cause, and upon due consideration,

It is ordered, adjudged and decreed by the Court:

1. That A. J. Hertz and John I. Levin be and they are hereby appointed receivers of all the property of every kind and nature, whether real, personal, or mixed, whether at law or in equity, whether in action or in possession, wheresoever situated, of the defendant Lion Bonding & Surety Company.
2. That the said receivers are hereby authorized and directed to take immediate possession of all of the property of the defendant herein and to institute and prosecute such suits as may in their judgment be necessary for the proper protection of the property and trust hereby vested in them, and likewise to defend all such actions instituted against them as such receivers, and also to go in and conduct the prosecution and defense of any suits now pending for or against the defendant which at any time may affect the property of which they are appointed receivers;
3. That before entering upon the discharge of their duties as such receivers and within three days from this date, they shall execute and file in the office of the Clerk of this Court an undertaking or bond to the Clerk with one or more sureties to be approved by this Court, or by the Clerk or Deputy Clerk thereof for the benefit of all persons who may be concerned in said property, in the penal sum of \$20,000.00 conditioned to the effect that they will faithfully discharge their duties as receivers herein and obey the orders of this Court.
4. That out of the moneys which shall come into the hands of the receivers, they shall pay the ordinary expenses incident to the trust hereby created, including the premium upon their bond as such receivers, and all taxes and assessments lawfully due or to become due thereon, so far as may be necessary to protect said property from

loss or confiscation, and such other sums as may be ordered by the Court.

5. Four months is declared to be a reasonable time and is hereby fixed as such within which the receivers may elect to renounce or assume any lease of any property to the Lion Bonding & Surety Company, and the receivers may make such election in any case within that time unless otherwise ordered by the Court.

6. The complainant herein is authorized to apply to any other United States District Court of competent jurisdiction for such order or orders in the premises as they may deem necessary in aid of the orders issued by this Court. The right is reserved to each and all parties to apply for any further or other instruction to the receivers as they may be advised, and this Court reserves the right to make such orders as it may deem fit and just touching the payment of all legal claims and accounts for labor, supplies, services, salaries and other liabilities; of said Lion Bonding & Surety Company, and to charge such claims or such proportion thereof, as to the Court may seem proper, upon the property of the Company as prior and preferred claims.

Dated May 2, 1921.

WILBUR F. BOOTH,  
*United States District Judge.*

(Endorsed:) Filed in the U. S. District Court, District of Minnesota, May 2, 1921.)

18

## EXHIBIT "4."

*(Order of the United States Circuit Court of Appeals Denying Application for Disapproval of Order Appointing Receivers, etc.)*

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1921.

No. 219, Original.

In re Bonding & Surety Company.

The application of the Lion Bonding & Surety Company under Section 56 Judicial Code, for disapproval by this Court of an order of the District Court of the United States for the District of Minnesota appointing A. J. Hertz and John I. Levin receivers of the property of said Company, in so far as said order may be operative outside the District of Minnesota, be and the same is hereby denied; provided, however, that the right of said receivers to the possession of such of the property of said Company as is situated in the District of Nebraska shall be subject to such right of possession thereof in the Department of Trade and Commerce of Nebraska as had accrued to it, under proceedings in the District Court of Douglas County in that state, when the right of the receivers arose under the



laws of the United States; but nothing herein contained shall be construed as preventing the receivers appointed by the District Court of the United States for the District of Minnesota from applying to the District Court of Douglas County, Nebraska, at any time for the delivery to them of the property of said Company in that state.

(Signed)

WILLIAM C. HOOK,

*Presiding Judge.*

Dated May 31, 1921.

EXHIBIT "5."

*Supplemental Petition.*

Document 183, Page 67.

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Comes now Department of Trade and Commerce of the State of Nebraska, by J. E. Hart, its duly appointed, qualified and acting Secretary, and shows to the Court:

19 1. That on April 12, 1921, an order was entered by this Honorable Court, directing that the plaintiff herein, the Department of Trade and Commerce of the State of Nebraska, shall and is hereby ordered to take possession forthwith of the property, records and effects and conduct the business of the defendant, Lion Bonding & Surety Company, and retain possession and conduct the business of said Company until such time as after a hearing it shall appear to the Court that the cause of this order has been removed, and that the company can properly resume possession of its records, property and effects in the conduct of its business.

2. That ever since the entry of said order, the Department of Trade and Commerce has been in active charge and control of the affairs of said defendant, Lion Bonding & Surety Company.

3. That since the entry of said order, application for receivers has been made in several different courts, to-wit: Minnesota, Texas and Indiana, and that a large number of suits have been instituted by various creditors in different states in which said defendant has been conducting its business, the total number of said suits now approximating 130, with a total alleged liability of \$500,000.00.

4. That the appointment of receivers in various states, as hereinbefore mentioned, has resulted in various Courts demanding possession of the assets and property of the defendant, lying within

their respective jurisdictions, and a multiplicity of suits as hereinbefore referred to, has so hampered and [interfered] with the conduct of the business of the defendant, by the plaintiff herein, as to prevent it from longer conducting the business of said corporation as a going concern.

5. That the stockholders of said defendant have failed, neglected and refused to remove any deficiency or embarrassment of the capital; that the capital and legal reserve of said Company has become seriously impaired to such an extent as to be hazardous to its policy holders, creditors, stockholders and to the public, and that its further transaction of business would be hazardous to its policy holders, creditors, stockholders and to the public; that the defendant is insolvent.

6. That owing to the embarrassment that has been occasioned by the litigation hereinbefore referred to, and the financial condition of the Company as hereinbefore set forth, it is no longer feasible or possible for your plaintiff herein to continue the business of the defendant, and the interest of all concerned, demand  
20 that the business of said defendant be liquidated, its assets marshalled, and used for the purpose of distributing the same to those persons who may be properly entitled thereto.

Wherefore the plaintiff prays for an order authorizing the winding up and liquidation of the business of said Company under the direction of the plaintiff herein, and that the plaintiff be authorized and directed to deal with the property, records, effects and business, together with the contracts and rights of action of said Company for the purpose of liquidating the same; and plaintiff further prays that all orders heretofore entered in this proceeding be continued in full force in so far as the same are applicable and necessary to further the liquidation of said Company in accordance hereto. That the agents and special employees heretofore engaged to conduct the business on behalf of the plaintiff herein be continued in such employment for the purpose of liquidation and that all orders respecting the same be continued in full force and effect.

And plaintiff further prays for such other and further relief as may be proper in the premises.

(Signed)

DEPARTMENT OF TRADE AND  
COMMERCE,

By CLARENCE A. DAVIS,

*Attorney General,*

By T. J. McGUIRE,

*Assistant Attorney General,*

*Its Attorneys.*

Verified and filed May 28th, 1921.

EXHIBIT "6."

*Answer.*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF  
NEBRASKA, Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Now comes the defendant and in answer to plaintiff's supplemental petition alleges:

I.

Defendant admits the allegations in plaintiff's petition contained.

21 II.

Further answering the defendant alleges that owing to the large number of suits pending against it in various states in which it has been transacting business, and because of its inability to discharge its obligations to various creditors, that it is for the best interest of all concerned that the order of liquidation prayed for in plaintiff's supplemental petition be made.

Wherefore the defendant joins the plaintiff in asking that the prayer in plaintiff's supplemental petition herein be granted, and that an order be entered directing the liquidation of the business of the defendant by the Department of Trade and Commerce of the State of Nebraska.

(Signed)

LION BONDING AND SURETY  
COMPANY,  
By EDWARD P. McDONALD,  
*Attorney for the Defendant.*

Verified and filed May 28th, 1921.

## EXHIBIT "7."

*(Notice of Hearing of Application for Order Authorizing Liquidation of the Business of the Defendant.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF  
NEBRASKA, Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

To the above-named defendant or its attorney:

You are Hereby notified that on Saturday May 28th, 1921, at 2:30 P. M. the plaintiff will call up for hearing before Honorable Arthur C. Wakely, one of the Judges of the District Court of Douglas County, its application for an order authorizing and directing the liquidation of the business of the defendant, Lion Bonding & Surety Company.

(Signed)

DEPARTMENT OF TRADE AND  
COMMERCE,  
By T. J. McGUIRE,  
Attorney General, Its Attorney.

22      Service of the above notice acknowledged this 28th day of  
May 1921, and the defendant consents to an immediate hear-  
ing.

(Signed)

EDWARD P. McDONALD,  
Attorney for Defendant.

## EXHIBIT "8."

*(Order Authorizing Liquidation of the Business of the Defendant.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF  
NEBRASKA, Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

This matter came on to be heard upon the Supplemental Petition of the Department of Trade and Commerce of the State of Nebraska for an order authorizing and directing said Department of Trade and Commerce to liquidate the business of the defendant, and the answer of the defendant Lion Bonding & Surety Company, and it appearing to the Court that due and proper notice of this hearing

has been given to the defendant and the parties appearing by their respective counsel, and after a full hearing thereon, and the Court being fully advised in the premises finds

That all of the allegations in said supplemental petition contained are true, and that is for the best interest of creditors, stockholders, policy holders and the general public that the business of the defendant be liquidated in the manner provided by law, by the Department of Trade and Commerce of the State of Nebraska, and that the same is necessary by reason of the condition of affairs of said Company, wherefore it is hereby

Ordered that the business of the defendant Lion Bonding & Surety Company be liquidated under the direction of the department of trade and Commerce of the State of Nebraska and that said Department of Trade and Commerce is hereby directed to deal with the property, records, effects and business of said defendant in the name of the Department of Trade and Commerce of the State of Nebraska subject to the orders and directions of this Court, as the same may be entered from time to time, and said Department of Trade and Commerce is hereby authorized and directed to do all things necessary to properly liquidate said Company to marshal its assets and dispose the same to persons entitled thereto under the supervision and direction of this Court.

It is further ordered that all orders heretofore entered in this proceeding and not in conflict herewith are hereby continued in full force and effect together with all appointments heretofore made of special agents and assistants of the Department of Trade and Commerce.

Dated May 28th, 1921.

By the Court.

(Signed)

ARTHUR C. WAKELY,  
Judge.

Filed May 28th, 1921.

EXHIBIT "9."

*(Petition of Plaintiff to Employ Necessary Assistants, etc., for the Purpose of Conducting the Affairs of the defendant.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

Comes now the plaintiff herein and shows to the Court:

I.

That it has appointed Amos Thomas as Special Agent, to manage, direct and carry on the business and affairs of the defendant herein.

## II.

That said Amos Thomas is now, under such appointment, managing and conducting the business and affairs of said defendant.

## III.

That in order to properly carry on, conduct and administer the business and affairs of the defendant, it is necessary that a large force of assistants be employed; that numerous law suits must be defended and attorneys retained for such purposes; that a large amount of claims against the defendant must be paid; that other incidental expenses must be made, and that for the purpose of making such payments, it is necessary that a large amount of securities of said defendant be sold, liquidated and otherwise converted into cash money.

24 Wherefore the plaintiff prays that an order may issue forthwith authorizing it to employ all assistants necessary for the purpose of conducting the affairs of said defendant, that it may employ and retain all and any attorneys, counselors, or legal advisors that it may deem necessary for the proper defense of suits and other purposes and that it may compromise, settle and adjust any and all just claims presented against the defendant, and that it be authorized to sell, negotiate, vend and dispose of any and all securities of said defendant that it may deem advisable in order to fully and efficiently conduct the business and affairs of said defendant.

(Signed)

DEPARTMENT OF TRADE AND COMMERCE  
OF THE STATE OF NEBRASKA,  
By AMOS THOMAS,  
*Special Agent.*

Filed May 16, 1921.

## EXHIBIT "10."

*(Order Authorizing Employment of Additional Assistants, etc.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Upon reading and filing the petition of the Department of Trade and Commerce of the State of Nebraska, plaintiff this day presented to me in the above entitled proceeding, praying that an order may be made authorizing it to employ any and all assistants necessary to properly continue the business and affairs of the defendant, to



employ the necessary legal aid, to adjust and pay all just claims presented against the defendant, and to liquidate such securities of the defendant as may become necessary to properly carry on the business and affairs of the defendant, it is hereby

Ordered that the said plaintiff be authorized to employ such assistants as may become necessary to properly carry on and conduct the business and affairs of the defendant, to retain such attorneys, counselors, and legal advisors, as it may deem necessary; to adjust, settle and pay any and all just claims that may be presented against the defendant, to sell any of the securities of the defendant at the best market price obtainable, which it may be necessary in order to properly administer, conduct and carry on the business and affairs of said defendant.

Signed this 16th day of May, 1921.

By the Court.

(Signed)

ARTHUR C. WAKELY,

Judge.

Filed May 16, 1921.

EXHIBIT "11."

*(Appointment of Amos Thomas as Special Agent of the Department of Trade & Commerce to Manage Affairs of Defendant.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Comes now plaintiff herein and shows to the Court that it has appointed Amos Thomas, Special Agent of the Department of Trade and Commerce of the State of Nebraska to assume the management of the affairs of the defendant herein, and that said plaintiff has agreed to pay the said Amos Thomas for such services \$1,000.00 per month, with a minimum fee of \$5,000.00.

(Signed)

DEPARTMENT OF TRADE AND  
COMMERCE OF THE STATE  
OF NEBRASKA.

J. E. HART,

Secretary,

By T. J. McGUIRE,

Assistant Attorney General.

Filed May 16, 1921.

## EXHIBIT "12."

*(Order Approving Appointment of Amos Thomas as Special Agent.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

The plaintiff herein having filed an instrument whereby it shows  
the appointment of a special agent to manage the affairs  
26 of the defendant herein at a salary of \$1,000.00 per month,  
with a minimum fee of \$5,000.00, it is hereby

Ordered that the appointment of said Amos Thomas as such special  
agent for the management of the affairs of the defendant at a  
salary of \$1,000.00 per month, with a minimum fee of \$5,000.00 is  
hereby approved.

Signed this 16th day of May, 1921, by the Court.

ARTHUR C. WAKELY,  
Judge.

Filed May 16, 1921.

## EXHIBIT "13."

*(Petition of Plaintiff to Bring Suit in Jurisdictions Where Property  
of Defendant May Be Found.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

To the District Court of the State of Nebraska in and for Douglas  
County:

The plaintiff herein respectfully shows:

I.

That on the 12th day of April, 1921, by an order duly given, made  
and entered in this Court, the plaintiff was duly placed in charge  
of the business and affairs of the defendant; that thereafter, the plain-  
tiff took possession of the business and property of the defendant,  
and is now engaged in the management of its business and affairs.

## II.

That the plaintiff is advised and verily believes that the defendant has goods, chattels, choses in action, real estate and other property in other jurisdictions than that of the District Court of Douglas County, Nebraska, by reason of the fact that the defendant was, prior to the 12th day of April, 1921, engaged in the insurance business in such other jurisdictions.

## III.

That the plaintiff upon diligent inquiries, is informed and believes that it is necessary to bring an action in such other jurisdictions in order to place the property in such other jurisdictions in the control of the plaintiff.

27 Wherefore the plaintiff prays for leave to bring an action in any and every jurisdiction where the property of the defendant may be found, in order to fully and completely bring all of the assets of the defendant within and under the control of the plaintiff.

Dated this 20th day of May, 1921.

(Signed) DEPARTMENT OF TRADE & COMMERCE  
OF THE STATE OF NEBRASKA,  
By AMOS THOMAS,  
*Special Agent.*

Duly verified and filed May 20th, 1921.

## EXHIBIT "14."

*(Order Authorizing Plaintiff to Bring Suit.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Upon reading and filing the verified petition of the plaintiff herein for leave to file suits in every and any jurisdiction where property of the defendant may be found, or where the defendant may have been authorized to engage in the insurance business prior to the 12th day of April, 1921, and the Court being satisfied that the plaintiff should be authorized to bring such action or actions, now therefore on motion of Amos Thomas, special agent of the plaintiff herein, it is hereby

Ordered that the said plaintiff be and it is hereby authorized and directed to commence and prosecute an action to secure possession and control of the assets, business and affairs of the defendant herein in each and every jurisdiction where assets of said defendant may be found, or where prior to the 12th day of April, 1921, the said defendant may have been authorized to engage in the insurance business.

Dated this 20th day of May, 1921.

(Signed)

ARTHUR C. WAKELY,  
Judge.

Filed May 20th, 1921.

28

## EXHIBIT "15."

*(Petition of Plaintiff to Remove Certain Securities from Place of Deposit, etc.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

vs.

LION BONDING & SURETY COMPANY, Defendant.

Now comes the plaintiff herein, by Amos Thomas, its special agent, and shows to the Court:

## I.

That there are on deposit with the Department of Trade and Commerce of the State of Nebraska, certain securities belonging to the defendant herein, consisting mostly of mortgages, loans, amounting to approximately \$212,950.00.

## II.

That part of the securities in a total amount of \$100,000 were deposited with the said Department of Trade and Commerce of the State of Nebraska to comply with Section 13, Article 4, Chapter 190 of the laws of Nebraska, 1919.

## III.

That the balance of said securities were deposited under permission granted by the above entitled section in order to comply with the laws of states other than the state of Nebraska, in which the defendant was licensed to do business.

## IV.

That the defendant has ceased to engage in the writing of new business in all states.

## V.

That in order to conserve the assets of said Company, avoid waste and multitudinous litigation, it will be necessary to convert from time to time as conditions warrant, a portion of said Company's assets into cash, to adjust and satisfy the legitimate claims now pending and arising daily, all as set forth in petition for authority to act.

Further it is believed that with available funds with which to adjust and satisfy claims, a large amount of assets can be saved, all to the benefit of the policy holders, creditors, stockholders and the public.

29 Wherefore the plaintiff prays that it may have an order granted unto it authorizing it to remove securities from their place of deposit, with the Department of Trade and Commerce, of the State of Nebraska in excess of the value of \$100,000.00, as conditions may warrant from time to time for the uses and purposes aforesaid.

(Signed) DEPARTMENT OF TRADE AND COM-  
MERCE OF THE STATE OF NE-  
BRASKA,

By AMOS THOMAS,  
*Special Agent.*

Filed May 16, 1921.

## EXHIBIT "16."

*(Order Authorizing Removal of Certain Securities.)*

In the District Court, Douglas County, Nebraska.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA,  
Plaintiff,

VS.

LION BONDING & SURETY COMPANY, Defendant.

Upon reading the petition of the plaintiff herein, this day presented to me in the above entitled proceeding and praying that an order may be made in said matter, adjudging and decreeing that it may be authorized to remove from the securities deposited with the Department of Trade and Commerce of the State of Nebraska, by the defendant herein such securities in excess of \$100,000.00, and it appearing to me that the necessity for such deposit has ceased, it is

Ordered that the prayer of said petition be granted, and that the plaintiff herein be and it is hereby authorized to remove all such securities in excess of \$100,000.00 as conditions may warrant from time to time, for the use and purposes therein stated.

Signed this 16th day of May, 1921.

By the court.

(Signed)

ARTHUR C. WAKELY,  
*Judge.*

Filed May 16, 1921.

Filed in U. S. Dist. Court, Sept. 6, 1921.

R. C. HOYT,  
*Clerk.*

30

(*Affidavit of Bruce W. Sanborn.*)

In the District Court of the United States for the District of Nebraska,  
Omaha Division.

In Equity.

No. 308.

A. J. HERTZ and JOHN I. LEVING, as Receivers of the Lion Bonding  
and Surety Company, Complainants,

vs.

LION BONDING AND SURETY COMPANY, E. R. GURNEY, H. C. LEIGH,  
E. P. McDonald, Dan F. Brown, Phil H. Kohl, Chas. C. Brandt,  
F. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Depart-  
ment of Trade and Commerce of the State of Nebraska, and Amos  
Thomas, Personally and as the Agent and Representative of the  
Department of Trade and Commerce of the State of Nebraska, and  
W. A. Robinson, Jr., Defendants.

STATE OF MINNESOTA,

*County of Ramsey, ss:*

Bruce W. Sanborn, being first duly sworn on oath says that he is a member of the firm of Sanborn, Graves & Ordway, attorneys for the complainants in the above-entitled action; that there have come to said complainants for attention numerous lawsuits pending in the Federal District in which they are the duly appointed and acting receivers, said lawsuits having been brought against the Lion Bonding & Surety Company, and that the said receivers have requested of the defendant Department of Trade and Commerce of the State of Nebraska and of Amos Thomas, its special agent, the files pertaining to said lawsuits so that said receivers might properly defend the same; that said Department of Trade and Commerce of the State of Nebraska and Amos Thomas, its special agent, have declined to furnish said receivers with the files so requested and that by reason thereof



in said suits judgments have been entered and it has been impossible for these complainants to properly defend such suits or answer therein, and that irreparable damage to creditors and others interested in the liquidation of said Lion Bonding & Surety Company has resulted, and that irreparable damage has resulted to creditors and others interested in the liquidation of said property by reason also of the facts set forth in the Bill of Complaint herein and that a continuance of said Course on the part of the Department of Trade and Commerce of the State of Nebraska and Amos Thomas, its special agent, and of other defendants will cause further irreparable damage to creditors and others interested in the receivership of said defendant.

31 Further affiant sayeth not except that this affidavit is made in support of the motion for injunction, notice whereof is returnable this 24th day of September, 1921.

BRUCE W. SANBORN.

Subscribed in my presence and sworn to before me this 24th day of September, 1921.

(Notary Seal.)

ANNA L. HOWLAND,  
Notary Public.

Endorsed: Filed in the District Court on September 24, 1921.

(Affidavit of Bruce W. Sanborn.)

STATE OF MINNESOTA,  
County of Ramsey, ss:

Bruce W. Sanborn, being first duly sworn, on oath says that the following is a true copy of a letter directed by the complainants herein to Amos Thomas under date of July 14 last:

"Will you please furnish us with a statement of property and assets of the Lion Bonding & Surety Company in the states in which we have been appointed receivers.

Since our appointment by Judge Booth, we have been unable to get any statement of the assets of the Company, and whatever property we have taken possession of, was not the result of any direct information obtained from the Company, but was due largely to accident. If the Company has any assets in the districts in which we are receivers, these assets should be so scheduled that we may know what and where they are, so as to properly conserve them in the interest of the stockholders and the creditors of the Company."

and that the following is an answer to said letter directed by Amos Thomas and signed by him to one of the receivers aforesaid:

"Replying to your letter of the 14th instant.

Until the audit, which is now being made by a certified public accountant, is completed it is not likely that any statement will be made as to the assets and liabilities of this company.



Your statement with reference to properly conserving the assets in the interest of the stockholders and creditors of the company strikes me as being quite humorous."

and that the following is a letter directed to this affiant by said Amos Thomas and signed by him on July 1 in answer to the letter  
32 written by said affiant at the suggestion of Judge Booth with reference to transfer to Minnesota receivers of some of the assets of the Lion Bonding & Surety Company:

"Replying to your letter of the 28th ultimo requesting my attitude towards the suggestion of Hon. Wilbur F. Booth, with reference to the transfer of Lion Bonding & Surety Company assets.

As I understand the order of the U. S. Circuit Court of Appeals, you are left free to make any application to the District Court of Douglas County, Nebraska, for a transfer of any funds or assets, subject to its control, as you think proper. In view of this privilege, and of our questioning on appeal the propriety and validity of the order appointing a receiver made by the U. S. District Court, District of Minnesota, I feel that the request that I take a definite position on the suggestion for the transfer of assets, in advance of any expression of the court under whose direction I am proceeding, is premature, and that it is not in order for me to commit myself, or the Department of Trade & Commerce, one way or the other on that matter at this time.

Deposits of securities of this Company have been made with the Departments of four states, which are subject to the conditions imposed by statutes, and an interpretation of the governing statutes of those states will doubtless be involved in the ultimate distribution of the assets. On this account also, it is inadvisable to anticipate by agreement, at this time, the probable action of our local court.

A copy of your letter and my reply thereto is being forwarded to Hon. Clarence A. Davis, Attorney General of Nebraska for his information and guidance."

Further affiant sayeth not.

BRUCE W. SANBORN.

Subscribed in my presence and sworn to before me this 24th day of September, 1921.

[SEAL.]

R. C. HOYT,

*Clerk.*

JOHN NICHOLSON,

*Deputy.*

Endorsed: Filed in the District Court on September 24, 1921.

33 (*Motion of Defendants, Department of Trade and Commerce et al., to Dismiss Bill of Complaint.*)

The defendants, the Department of Trade and Commerce of the State of Nebraska, W. B. Young and J. E. Hart, appearing herein

by their counsel, Clarence A. Davis, Attorney General of the State of Nebraska, T. J. McGuire, Assistant Attorney General, move the court to dismiss the bill of complaint of the complainants herein because the facts therein stated and set forth are not sufficient to constitute a valid cause of action in equity nor to vest this court with jurisdiction over the subject matter of said suit and in this behalf these defendants assign specifically the following grounds:

1. It appears on the face of the bill filed herein by complainants and of the documents and exhibits annexed thereto and made a part of said bill that under and pursuant to an order and judgment of the District Court of Douglas County, Nebraska, made and entered on the 12th day of April, 1921, the said Department of Trade and Commerce took possession, control, operation and administration of the offices, records, books, properties, assets and choses in action of the defendant, the Lion Bonding & Surety Company for the purposes of operating and conducting said insurance company and conserving its assets in the interest of the public, the creditors and stockholders of said company in special proceedings therefor provided by Chapter 190, Laws of Nebraska of 1919, and that said Department now is and has been continuously since said April 12, 1921, in discharge of its duties pursuant to said appointment made in due and regular judicial proceedings by the said District Court of Douglas County, Nebraska, and has, pursuant to said order and with the approval of said District Court, placed its special agent, the defendant, Amos Thomas, in charge of said company, its properties and assets within the territorial jurisdiction of the said state court.

2. In and by the said judicial proceedings had in the District Court of Douglas County, Nebraska, pursuant to the authority conferred upon said court under Chapter 190, Laws of Nebraska of 1919, the said state court by and through these defendants, its appointees with all of the powers of a receiver conferred by statute on said 12th day of April, 1921, took exclusive jurisdiction, control and custody of all of the property of said Lion Bonding & Surety Company as appears fully and at large on the face of complainants' bill and the documents and Exhibits annexed thereto and made a part thereof and thereby withdrew the said property and all thereof within the territorial jurisdiction of said court from the jurisdiction and control of all other courts including the District Court of the United States for the District of Nebraska and the District Court of the United States for the District of Minnesota Fourth Division, and under the rules of comity subsisting between the courts of the State of Nebraska and the courts of the United States, the mutual recognition of which is necessary to avoid unseemly conflicts of authority, the priority and exclusiveness of the jurisdiction and control of said property, the subject of this action, so taken and exercised by said state court should be accepted and recognised by this honorable court, and by virtue of said rule, the said United States District Court for the District of Nebraska is without any jurisdiction or authority to assume or take jurisdiction

or control through receivers by injunction or otherwise, of any of the property of said Lion Bonding & Surety Company within the State of Nebraska or the territorial jurisdiction of the District Court of Douglas County, in said state.

3. It appears on the face of the bill of complaint of the complainants filed herein and the documents and exhibits annexed thereto and made a part thereof that the defendant corporation, the Lion Bonding & Surety Company was created and organized under the laws of the State of Nebraska and that it conducted and administered all its financial and pecuniary affairs at its principal office in the City of Omaha, Douglas County, Nebraska, all subject to the statutory regulations provided for by Chapter 190, Laws of Nebraska of 1919, including all of the provisions thereof for possession, operation, liquidation, distribution of its assets and dissolution by the Department of Trade and Commerce of said state upon the orders, directions and judgments of the appropriate district court of said state. Wherefore defendant suggests and submits to this court that any suit for the closing up of said corporation and distribution of all of its assets is of a local nature within the purview of the judicial code of the United States in which primary jurisdiction is vested solely and exclusively in the courts of the domicile of the said corporation and that on the face of complainants' said bill of complaint, the proceedings therein mentioned for the appointment of complainants as receivers in the said District Court of the United States for the District of Minnesota, Fourth Division, is the pretended exercise of primary jurisdiction to close the business and distribute the property and assets through general receivers of a corporation brought into existence by the laws of the sovereign State of Nebraska and whose continuance in business, dissolution or winding  
35 or closing up is vested exclusively in the domiciliary courts and is not competent to be exercised by a foreign court, and therefore the said United States District Court for the District of Minnesota was without jurisdiction of the subject matter of said action and could not for the purposes stated, acquire jurisdiction of said corporation and its properties within the state and District of Minnesota.

4. It appears on the face of the bill of complainants filed herein and of the documents and exhibits thereto annexed and made a part thereof that the only pecuniary interest of the plaintiff in the controversy as presented by the said bill of complaint of A. H. Karatz in the United States District Court for the District of Minnesota was the sum of \$2,100.00 alleged to be payable on the draft of that sum as set forth in Paragraph 3 of the complaint of said Karatz and that the whole amount in controversy in said original suit in the United States District Court for the District of Minnesota is limited to the said principal sum of \$2,100.00 and does not equal or exceed the sum of \$3,000.00 exclusive of interest and costs and that the said original suit wherein the complainants herein were appointed receivers was not within the cognizance of a district court of the United States

because the sum in controversy did not equal \$3,000.00 exclusive of interest and costs.

5. It appears on the face of the bill of complaint of the complainants filed herein and of the documents and exhibits annexed thereto and made a part thereof that the bill of A. H. Karatz mentioned therein in his suit against the Lion Bonding & Surety Company filed with and exhibited to the said United States District Court for the District of Minnesota, Fourth Division, was founded on a simple contract on a claim not reduced to judgment and that the complainant in said suit, A. H. Karatz, had not invoked or exhausted his remedy at law and that in and by his said bill he asserted no specific lien nor any specific lien, legal or otherwise, in the property of the Lion Bonding & Surety Company and that the said Karatz did not by his said bills so exhibited in the United States District Court for the District of Minnesota, set forth or allege any jurisdictional averments entitling him to invoke the powers of a court of chancery such as are required by the rules and practice of the equity courts of the United States to give him standing or entitle him to prosecute a suit in equity for any exclusive equitable relief or for the appointment of a receiver or receivers or for the administration of the property of the Lion Bonding & Surety Company and that therefore the said United States District Court for the District of Minnesota,

36 Fourth Division, as a court of equity was without jurisdiction of the subject matter presented by the bill of said A. H. Karatz and was without power to appoint a receiver for or otherwise administer the property and effects of the Lion Bonding & Surety Company.

CLARENCE A. DAVIS,

*Atty. General;*

T. J. McGUIRE,

*Asst. Atty. Gen.,*

*Solicitors and Counsel for the Defendants  
Department of Trade and Commerce of  
the State of Nebraska, W. B. Young,  
and J. E. Hart.*

HALLECK F. ROSE,

*Of Counsel.*

Endorsed: Filed in the District Court on September 24, 1921.

(*Motion of Defendants Amos Thomas et al. to Dismiss Bill of Complaint.*)

The defendants, Amos Thomas personally and as agent and representative of the Department of Trade and Commerce of the State of Nebraska, W. A. Robinson, Jr., and E. P. McDonald, appearing herein by their counsel, Halleck F. Rose, George W. Pratt and Amos Thomas, move the court to dismiss the bill of complaint of the complainants herein because the facts therein stated and set forth

are not sufficient to constitute a valid cause of action in equity nor to vest this court with jurisdiction over the subject matter of said suit and in this behalf these defendants assign specifically the following grounds:

1. It appears on the face of the bill filed herein by complainants and of the documents and exhibits annexed thereto and made a part of said bill that under and pursuant to an order and judgment of the District Court of Douglas County, Nebraska, made and entered on the 12th day of April, 1921, the said Department of Trade and Commerce took possession, control, operation and administration of the offices, records, books, properties, assets and choses in action of the defendant, the Lion Bonding & Surety Company for the purposes of operating and conducting said insurance company and conserving its assets in the interest of the public, the creditors and stockholders of said company in special proceedings therefor provided by Chapter 190. Laws of Nebraska of 1919, and that said Department now is and has been continuously since said April 12, 1921, in discharge of its duties pursuant to said appointment made in due and regular judicial proceedings by the said District Court of Douglas County, Nebraska, and has, pursuant to said order and with the approval of said District Court, placed its special agent, the defendant, Amos Thomas, in charge of said company, its properties  
37 and assets within the territorial jurisdiction of the said state court.

2. In and by the said judicial proceedings had in the District Court of Douglas County, Nebraska, pursuant to the authority conferred upon said court under Chapter 190, Laws of Nebraska of 1919, the said state court by and through these defendants, its appointees with all of the powers of a receiver conferred by statute on said 12th day of April, 1921, took exclusive jurisdiction, control and custody of all of the property of said Lion Bonding & Surety Company as appears fully and at large on the face of complainants' bill and the documents and exhibits annexed thereto and made a part thereof and thereby withdrew the said property and all thereof within the territorial jurisdiction of said court from the jurisdiction and control of all other courts including the District Court of the United States for the District of Nebraska and the District Court of the United States for the District of Minnesota, Fourth Division, and under the rules of comity subsisting between the courts of the State of Nebraska and the courts of the United States, the mutual recognition of which is necessary to avoid unseemly conflicts of authority, the priority and exclusiveness of the jurisdiction and control of said property, the subject of this action, so taken and exercised by said state court should be accepted and recognized by this honorable court, and by virtue of said rule the said United States District Court for the District of Nebraska is without any jurisdiction or authority to assume or take jurisdiction or control through receivers by injunction or otherwise, of any of the property of said Lion Bonding & Surety Company within the State of Nebraska or the territorial jurisdiction of the District Court of Douglas County in said state.

3. It appears on the face of the bill of complaint of the complainants filed herein and the documents and exhibits annexed thereto and made a part thereof that the defendant corporation, the Lion Bonding & Surety Company was created and organized under the laws of the State of Nebraska and that it conducted and administered all its financial and pecuniary affairs at its principal office in the City of Omaha, Douglas County, Nebraska, all subject to the statutory regulations provided for by Chapter 190, Laws of Nebraska of 1919, including all of the provisions thereof for possession, operation, liquidation, distribution of its assets and dissolution by the Department of Trade and Commerce of said state upon the orders, directions and judgments of the appropriate district court of said state. Wherefore defendant suggests and submits to this

38 court that any suit for the closing up of said corporation and distribution of all of its assets is of a local nature within the purview of the judicial code of the United States in which primary jurisdiction is vested solely and exclusively in the course of the domicile of the said corporation and that on the face of complainants' said bill of complaint, the proceedings therein mentioned for the appointment of complainants as receivers in the said District Court of the United States for the District of Minnesota, Fourth Division is the pretended exercise of primary jurisdiction to close the business and distribute the property and assets through general receivers of a corporation brought into existence by the laws of the sovereign State of Nebraska and whose continuance in business, dissolution or winding or closing up is vested exclusively in the domiciliary courts and is not competent to be exercised by a foreign court and therefore the said United States District Court for the District of Minnesota was without jurisdiction of the subject matter of said action and could not for the purposes stated acquire jurisdiction of said corporation and its properties within the state and District of Minnesota.

4. It appears on the face of the bill of complainants filed herein and of the documents and exhibits thereto annexed and made a part thereof that the only pecuniary interest of the plaintiffs in the controversy as presented by the said bill of complaint of A. H. Karatz in the United States District Court for the District of Minnesota was the sum of \$2,100.00 alleged to be payable on the draft of that sum as set forth in Paragraph 3 of the complaint of said Karatz and that the whole amount in controversy in said original suit in the United States District Court for the District of Minnesota is limited to the said principal sum of \$2,100.00 and does not equal or exceed the sum of \$3,000.00 exclusive of interest and costs and that the said original suit wherein the complainants herein were appointed receivers was not within the cognizance of a district court of the United States because the sum in controversy did not equal \$3,000.00 exclusive of interest and costs.

5. It appears on the face of the bill of complaint of the complainants filed herein and of the documents and exhibits annexed thereto and made a part thereof that the bill of A. H. Karatz mentioned



therein in his suit against the Lion Bonding & Surety Company filed with and exhibited to the said United States District Court for the District of Minnesota, Fourth Division was founded on a simple contract on a claim not reduced to judgment and that the complainant in said suit A. H. Karatz, had not invoked or exhausted his remedy at law and that in and by his said bill he asserted no specific lien nor any specific lien, legal or otherwise, in the property of the

39 Lion Bonding & Surety Company and that the said Karatz did not by his said bill so exhibited in the United States District Court for the District of Minnesota, set forth or allege any jurisdictional averments entitling him to invoke the powers of a court of chancery such as are required by the rules and practice of the equity courts of the United States to give him standing or entitle him to prosecute a suit in equity for any exclusive equitable relief or for the appointment of a receiver or receivers or for the administration of the property of the Lion Bonding & Surety Company and that therefore the said United States District Court for the District of Minnesota, Fourth Division, as a court of equity was without jurisdiction of the subject matter presented by the bill of said A. H. Karatz and was without power to appoint a receiver for or otherwise administer the property and effects of the Lion Bonding & Surety Company.

HALLECK F. ROSE,  
GEORGE W. PRATT,  
AMOS THOMAS,

*Solicitors and Counsel for the Defendants  
Amos Thomas, Personally and as Agent  
and Representative of the Department  
of Trade and Commerce of the State of  
Nebraska, W. A. Robinson, Jr., and E.  
P. McDonald.*

Endorsed: Filed in the District Court on September 24, 1921.

*(Affidavit of Amos Thomas.)*

STATE OF NEBRASKA,  
Douglas County, ss:

Amos Thomas of lawful age, being first duly sworn on his oath deposes and says as follows:

I am one of the defendants in the above entitled suit and upon entry of the order of the District Court of Douglas County, Nebraska, in the suit by the Department of Trade and Commerce of the State of Nebraska against the Lion Bonding & Surety Company — or about the 12th day of April, 1921, mentioned in the bill of complaint of plaintiffs filed herein and of the documents and exhibits thereto attached, I was appointed by the Department of Trade and Commerce as its special agent and representative to have charge of the property, business and affairs of the Lion Bonding & Surety Com-

pany under the orders and directions of said Department of Trade and Commerce and the said District Court of Douglas County, Nebraska, and from and since said date I have, with the approval of said District Court, been in charge of the home offices and assets of said company within the State of Nebraska and am now acting in the capacity of a liquidator by virtue of said appointment and subsequent orders of said court with the authority and powers vested by said order and by the laws of the State of Nebraska in the Department of Trade and Commerce. I do not have or claim any authority over the business, affairs, administration and liquidation of the Lion Bonding & Surety Company other than as derived by and through said judicial proceedings and by and under the statutes of Nebraska in that behalf.

I have read the bill of complaint of the plaintiffs, A. J. Hertz and John I. Levin as receivers, filed herein and the documents and exhibits annexed thereto and made a part thereof and I am personally well informed of the matters and things therein alleged and set forth. The compensation allowed and paid to me for my services under said appointment was fixed and determined by a memorandum made in writing by the Department of Trade and Commerce of the State of Nebraska filed with and presented to the said District Court of Douglas County, Nebraska, and approved by said court, and the same is, in my opinion, just, reasonable and fair in view of the nature of the services performed by me, the responsibilities imposed upon me and my capabilities and earning powers. The complainants have not at any time filed or presented to said District Court of Douglas County, Nebraska, any objections or exceptions to the rate or amount of said compensation nor made any application to the court to review, reduce or otherwise revise my salary and compensation.

The other expenses of said administration have been reasonable and just and the administration of the Lion Bonding & Surety Company has, in my opinion, been economically conducted and effected large and material saving to the creditors and stockholders and the expense of said administration has been very greatly reduced below the expense ratio experienced by said company under its corporate officers and no exception or protest has been filed or presented to said District Court touching the amount of the costs incurred in my administration of said Lion Bonding & Surety Company.

The plaintiffs have not to my knowledge protested to me or to the District Court of Douglas County against my continued possession of the home offices, premises, archives, property and assets of the

Lion Bonding & Surety Company under said appointment  
situate within the State of Nebraska, and it is not true in  
point of fact that the said plaintiffs have demanded of me  
or of any of the defendants all of the assets in the possession of myself or the Department of Trade and Commerce of the State of Nebraska including the books and records of said corporation, and the plaintiffs have not filed or presented to the said District Court of Douglas County any application or petition for the relinquishment

of said property subject to the order of said court or for delivery of possession thereof to the plaintiffs. I have not at any time knowingly refused information to the plaintiffs concerning any assets, files or records affecting the titles or rights of specific property of the Lion Bonding & Surety Company situate in any state or district outside the State of Nebraska in which the plaintiffs appear to be qualified and authorized by appointment of the United States District Court for the District of Minnesota or by ancillary proceedings in any other federal district than that of Nebraska but on the contrary I have furnished and transported to the plaintiffs certain of the files of the office and have given the plaintiffs certain data respecting properties or matters in controversy in such jurisdictions outside of Nebraska which appeared to be subject to the plaintiff's control and have co-operated in that manner uniformly to the end that in jurisdictions wherein the plaintiffs are apparently vested with a control of the property of said corporation they should have available all proofs of the titles or rights of the Lion Bonding & Surety Company in my control as custodian of the records of the home office so that plaintiffs could assert and maintain the rights of said corporation.

The only claims or demands to my knowledge ever asserted against me or the Department of Trade and Commerce to the home office, premises, records or assets of the Lion Bonding & Surety Company situated within the State of Nebraska and subject to the prior exclusive control and jurisdiction of the said District Court of Douglas County, Nebraska, were made and asserted in judicial proceedings upon an ancillary bill in equity filed in the District Court of the United States for the District of Nebraska, Omaha Division on the — day of May, 1921, and in an application served upon me which was filed and presented to the District Court of the United States for the District of Minnesota, Fourth Division. The application made to said United States District Court for the District of Minnesota was denied and the said ancillary bill presented to the District Court of the United States for the District of Nebraska is still pending and undetermined, and is pending upon a motion filed therein by the defendant, Lion Bonding & Surety Company, to dismiss the

42 said bill and upon an application of intervention made by the Department of Trade and Commerce of the State of Nebraska to intervene accompanied by its answer to said ancillary bill in which said Department asserts the prior, paramount and exclusive jurisdiction of the District Court of Douglas County, Nebraska, over the subject matter of said action. According to the best of my knowledge, understanding and belief, the District Courts of the United States in said judicial proceedings, both in the District of Minnesota and in the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit in the proceedings mentioned in the bill of complaint of plaintiffs filed herein have all recognized the prior and exclusive jurisdiction and control of the District Court of Douglas County, Nebraska, over the Lion Bonding & Surety Company, its premises, properties and administration or liquidation within the State of Nebraska under the prior proceedings had

in said court which were initiated as is shown by the bill of complaint of plaintiffs herein, on the 12th day of April, 1921.

It is not true in point of fact as it is alleged in bill of complaint of plaintiffs that this defendant or the Department of Trade and Commerce as appointees of said District Court of Douglas County, Nebraska, claim to exclude the creditors of the Lion Bonding & Surety Company residing in states and districts other than the State of Nebraska from participation in the distribution of the assets nor that the said department of Trade and Commerce or myself contend or claim that their bonds, mortgage or other securities deposited with the Insurance Department of the State of Nebraska are applicable in the first instance only to the debts and obligations of the Lion Bonding & Surety Company issued to or held by creditors residing in the State of Nebraska or that such creditors are entitled to priority in the payment or distribution of the money derived from said securities to the exclusion of other creditors. On the contrary it is my view and as far as I have been advised is the view of the officers comprising the Department of Trade and Commerce of the State of Nebraska that all of the assets and funds of said Lion Bonding & Surety Company should be subject to any specific pledge or preference that may be established, distributed and paid ratably to the creditors of said corporation without regard to their place of residence or the locality of the issuance of the contracts or obligations of said corporation. In the distribution of the assets of said corporation in the said pending administration so conducted by the District Court of Douglas County, Nebraska, it is the intention of myself as special agent and the said Department of Trade and Commerce to obtain the judgment and direction of the said District Court of Douglas County touching the lawful course of distribution and payments to be made to the creditors of said corporation and to conform thereto. Up to the date of the making of this affidavit no application has been made by the plaintiffs or other persons to the said District Court of Douglas County, Nebraska, for determination by that court on behalf of all or any of the Creditors of the manner of the distribution of the funds or assets of said Lion Bonding & Surety Company other than is contained in the original and supplemental petitions filed therein by the Department of Trade and Commerce and no final judgment or order of said court to this date has been invoked, ordered or rendered.

Neither the plaintiffs nor any one in their behalf have ever made any application to the District Court of Douglas County Nebraska, for delivery to them of any part of the property of the Lion Bonding & Surety Company in the State of Nebraska and the plaintiffs have not availed themselves of the right and privilege saved to them by the order of the United States Circuit Court of Appeals mentioned and set forth in their bill recognizing the right of possession thereof in the Department of Trade and Commerce of Nebraska which had accrued to it under proceedings of the District Court of Douglas County in that state prior to the appointment of complainants as received by the United States District Court for the District of Minnesota which order of said United States Circuit Court of Appeals in

recognition of the right of said state court to determine if conditions should arise or be confronted making it appropriate and prudent in the interest of all creditors to resign its prior jurisdiction provided as follows:

"But nothing herein contained shall be construed as preventing the receivers appointed by the District Court of the United States for the District of Minnesota from applying to the District Court of Douglas County, Nebraska, at any time for the delivery to them of the property of said company in that state."

It is not true in point of fact that I have ever refused to furnish the plaintiffs with information regarding the assets and property of the defendant corporation nor that I have secreted or concealed the same from the complainants. On the contrary thereof, the plaintiffs have had access to and have availed themselves of detailed information of the assets of said company contained in a voluminous and full report of the affairs and assets of said company prepared jointly by the Department of Trade and Commerce and the insurance departments of four other states which is on file as a public document in the Insurance Department of the State of Minnesota and a copy whereof is filed with and made a part of the petition of the Department of Trade and Commerce in the said administration suit in the District Court of Douglas County, Nebraska, and a copy whereof was also presented with and made a part of the petition presented to the Circuit Court of Appeals of the Eighth Circuit mentioned in the bill of complaint of the plaintiffs herein and according to the best of my recollection the said copy was also filed in the said proceedings in the suit of A. H. Karatz against the Lion Bonding & Surety Company in the United States District Court for the District of Minnesota wherein the plaintiffs were appointed. In said report and inventory of the assets of said corporation are listed the assets of specific property located in the different states and jurisdictions wherein the said Lion Bonding & Surety Company transacts business.

At one time, Bruce Sanborn, Esquire, counsel for the complainants herein did ask this affiant whether there would be any objection to the complainants placing an auditor in the home office to fully audit all of the accounts and claims and transactions of the said Lion Bonding & Surety Company in the said home office but neither said attorney nor plaintiffs ever demanded the privilege of doing so nor ever mentioned the subject further than to inquire whether there would be any objection to their pursuing that course. Thereupon I stated to the said attorney in substance that in the conduct of my administration I had already incurred the cost of having such an audit made and had arranged with auditors to have said work performed and that it would greatly embarrass and interfere with the audit I had arranged to have made and would create confusion to have another auditor or set of auditors come into my offices and work independently on the same records, and that in my opinion, it would be an unjust and unnecessary duplication of expenditures to have



said work duplicated and the said Sanborn as attorney upon that occasion expressed his assent to the above suggestions and said he would not press the matter and neither the said attorney nor the said complainants ever took any exceptions to or made any protests against the suggestions which I made and have never made any application to the District Court of Douglas County under whose authority and direction I hold possession of the offices of said corporation for the right to make said audit or to make any further or additional examination or inspection of the records, accounts or archives of said corporation. At said time or shortly thereafter the auditors with whom I had so arranged were at work or commenced work shortly thereafter to completely audit the books and accounts of said corporation and have not yet concluded their audit.

I have never disregarded the apparent authority of the plaintiffs as receivers in the states or districts of their primary or ancillary appointments and have never obstructed the performance by the plaintiffs of their duties under said appointment as said receivers in any of said jurisdictions but I have confined my administrative activities to the administration of the affairs of said Lion Bonding & Surety Company and its property that came into my hands by virtue of the orders of the District Court of Douglas County, Nebraska, and in jurisdictions wherein prior ancillary receivers of said Lion Bonding & Surety Company were appointed to aid the administration being conducted by the said District Court of Douglas County, Nebraska, save and except that I have appeared in said judicial proceedings instituted by said Karatz and the plaintiffs as mentioned in their bill of complaint filed herein and have exercised my privilege as representative of the Department of Trade and Commerce of the State of Nebraska and an appointee of the District Court of Douglas County, Nebraska, to assert the priority of the proceedings of said state court and to question the jurisdiction and powers of the courts invoked by said Karatz and the plaintiffs to appoint receivers or conduct primary administrations of said corporation or its property in other jurisdictions independent of and in hostility to the prior administration proceedings being conducted by the District Court of Douglas County, Nebraska, and I have respected and observed the adjudications of the said several courts of the United States as I have understood them.

No part of the assets or securities deposited by the Lion Bonding & Surety Company with the Insurance Department of the State of Nebraska have to this date been withdrawn under order of the said District Court of Douglas County or any other authority save and except on or about the 15th day of September, 1921, for the purpose of enabling a mortgagor whose note was so deposited to anticipate and pay and discharge his mortgage, I withdrew and receipted for the mortgage loan papers in one specific case, settled with and collected money due thereon and released the real estate that was pledged as security from the lien of the mortgage. I then obtained a certificate of deposit for the collection and transmitted the same to the Insurance Department. Afterwards in order to get a small sum



46 to discharge and pay the semi-monthly payroll of administration cost, I withdrew said certificate of deposit and deposited the same to the credit of my account as agent in the Omaha National Bank of Omaha, Nebraska. No other securities have been to this date withdrawn by me from the Insurance Department, and I have deposited with the Insurance Department a new certificate of deposit for the said item. It is not my intention to deplete the said assets or securities or to disburse the proceeds thereof otherwise than as may be directed by the said District Court of Douglas County, Nebraska. I submit, however, that in order to properly collect, safeguard and keep said funds, it is appropriate and prudent to have authority to withdraw the same as the exigencies of any particular case may require.

In my own opinion and as advised by counsel, I am answerable to the District Court of Douglas County, Nebraska, for the custody and possession of the home office premises, records, archives and assets placed in my hands by the order of said District Court of Douglas County, and am answerable to said court for the due and regular administration and liquidation of said corporation, and could not, without committing or being in contempt of the orders of said court, surrender control or possession of the home offices, records, archives or assets of said corporation in the State of Nebraska.

I therefore submit to this court that the due respect any comity which subsists between the courts of the United States and the courts of the State of Nebraska will not admit of the making of any order by this court, the performance of which will bring me in contempt of the orders of the District Court of Douglas County, Nebraska, and the refusal to perform which will bring me in contempt of this court, and that in view of the priority of the jurisdiction, and authority over the subject matter of the bill filed herein by complainants which vested in the District Court of Douglas County, Nebraska, on the 12th day of April, 1921, this court should decline to entertain the bill of complaint of plaintiffs or to take any proceedings or make any order thereon other than to dismiss the bill on the ground that the prior and exclusive jurisdiction of said state court over the subject matter of the controversy withdrew the property of the Lion Bonding & Surety Company within the State of Nebraska, from the jurisdiction and control of this honorable court, and of all other courts, including the United States District Court for the District of Minnesota.

Further affiant say-th not.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 23 day of September, 1921.

[Notarial Seal.]

WINFIELD R. ROSS,  
Notary Public.

47 Endorsed: Filed in the District Court on September 24, 1921.

(Order Denying Temporary Injunction and Dismissing Bill of Complaint September 24, 1921.)

April Term, 1921.

In Equity.

No. 308.

A. J. HERTZ and JOHN I. LEVINE, as Receivers for the Lion Bonding & Surety Company.

VS.

LION BONDING & SURETY COMPANY et al.

Before Judge Woodrough.

This cause came on for hearing upon the application of the complainants for a temporary injunction; all parties to said cause being present or represented by counsel, except the defendants, E. R. Gurney and Phil H. Kohl. Arguments are heard, and the Court *benig* fully advised therein,

It is Ordered that the application for a temporary injunction be, and the same is hereby, denied to which the complainants except.

This cause came on further to be heard on the motion of defendants, Department of Trade and Commerce of the State of Nebraska, W. B. Young and J. E. Hart, and the motion of defendants, Amos Thomas personally and as Agent and representative of the Department of Trade and Commerce of the State of Nebraska, W. A. Robinson, Jr., and E. P. McDonald, to dismiss the bill of complaint of complainants, and was argued by counsel, and the Court after being fully advised in the premises doth sustain said motions, and it is further—

Ordered, by the Court, that said bill of complaint be, and the same is hereby, dismissed; to which order the complainants except.

*Assignment of Errors.*

Now come the complainants in the above entitled action and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 24th day of September, 1921:

That the United States District Court for the Omaha Division District of Nebraska, erred in denying the motion of complainants for an order enjoining and restraining the defendants herein and each of them from secreting, concealing or otherwise disposing of any of the assets of the defendant, Lion Bonding & Surety Company, and from interfering in any manner with the exercise by these complainants of control and possession of the property and assets and books and records of said defendant corporation, particu-

larly such assets as are situated in the State of Nebraska, and from in any manner interfering with disposition of said property, and from bringing or maintaining any suit at law or in equity against any person for the recovery of any debt due the defendant corporation, or for the foreclosure of any mortgage or other lien held by said defendant upon the property of another, or for the recovery of the possession of any property of said defendant corporation; or from interfering in any manner with the management, control or possession by these complainants of the assets of said corporation or the possession of its books or records; and for an order directing the defendants and each of them to surrender all of the above named property in the possession of them or either of them, to these complainants as receivers, and dismissing bill of complaint.

Wherefore, the appellants pray that said order be reversed and that said District Court for the Omaha Division, District of Nebraska, be ordered to enter a decree reversing the decision of the lower court in said cause.

SANBORN, GRAVES & ORDWAY,

*Solicitors for Appellants.*

Endorsed: Filed in the District Court on September 26, 1921.

*(Petition for Appeal and Allowance Thereof.)*

To the Honorable J. W. Woodrough, District Judge:

The above named complainants, A. J. Hertz and John I. Levin, is receivers of the Lion Bonding & Surety Company, conceiving themselves aggrieved by the order rendered and entered in the above entitled cause on the 24th day of September, 1921, denying the complainants the relief sought by them in their motion for an injunction presented to this Honorable Court this day, and dismissing bill of complaint do hereby appeal from said order to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record and proceedings and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, sitting at Saint Louis, Missouri, on or before September 28th, 1921.

49 And your petitioner further prays that the proper order relating to the security to be required of them be made.

SANBORN, GRAVES & ORDWAY,

*Solicitors for Appellant.*

And now to-wit: on this 24th day of September, 1921, it is ordered, that the appeal be allowed as prayed for upon giving bond as required by law for the sum of Five Hundred (\$500.00) Dollars.

J. W. WOODROUGH,

*District Judge.*

Endorsed: Filed in the District Court on September 26, 1921.

*Bond on Appeal.*

Know all men by these presents:

That we, A. J. Hertz and John I. Levin, as receivers of the Lion Bonding and Surety Company, as principals, and National Surety Company, a corporation of New York, as surety, are held and firmly bound to the defendants herein, their heirs, executors, administrators, successors or assigns, in the full and just sum of Five Hundred (\$500.00) Dollars to be paid to said defendants, their heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Whereas, on September 24th, 1921, in a suit pending in the District Court of the United States for the District of Nebraska, Omaha Division, between these complainants and the above named defendants, an order was made denying the motion of complainants for an injunction and dismissing bill of complaint and said complainants have obtained an appeal of the aforesaid Court to reverse the order so made and a citation directed to the above named defendants citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit at the City of Saint Louis, Missouri, thirty (30) days after the date of said citation.

Now, the condition of the above obligation is such that if the said complainants shall prosecute said appeal to effect and answer all costs if they fail to make good their plea, then the above-  
50 obligation to be void, otherwise to remain in full force and virtue.

Sealed and Sealed in the presence of:

JOHN I. LEVIN.

A. J. HERTZ.

NATIONAL SURETY COMPANY,

By L. A. GREEN,

*His Attorney-in-fact.*

ERWEL McCLAY.

BRUCE W. SANBORN.

G. E. JOHNSON.

M. FREDERICKSEN.

STATE OF MINNESOTA,

*County of Ramsey, ss:*

A. J. Hertz and John I. Levin, being first duly sworn, on oath say that they are the receivers of the Lion Bonding and Surety Company, who signed the foregoing Bond, and that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to such matters they believe it to be true.

A. J. HERTZ.  
JOHN I. LEVIN.

Subscribed and sworn to before me this 24th day of September, 1921.

BRUCE W. SANBORN. [Notarial Seal.]  
BRUCE W. SANBORN,  
*Notary Public, Ramsey County, Minn.*

My commission expires Oct. 26, 1925.

Bond and sureties approved this 24th day of September 1921.

J. W. WOODROUGH,  
*Judge.*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

On this 23rd day of September A. D. 1921 before me appeared L. A. Green, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its  
51 board of directors, and said L. A. Green, acknowledged said instrument to be free act and deed of said corporation.

[Notarial Seal.]

G. E. JOHNSON,  
G. E. JOHNSON,  
*Notary Public, Ramsey County, Minnesota.*

My Commission Expires Sept. 26, 1924.

Endorsed: Filed in the District Court on September 26, 1921.

*Citation on Appeal.*

In the District Court of the United States for the District of Nebraska,  
Omaha Division.

In Equity.

No. 308.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding  
and Surety Company, Complainants,

vs.

LION BONDING AND SURETY COMPANY, E. R. GURNEY, H. C. LEIGH,  
E. P. McDonald, Dan F. Brown, Phil H. Kohl, Chas. C. Brandt,  
E. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Depart-  
ment of Trade and Commerce of the State of Nebraska, and Amos  
Thomas Personally and as the Agent and Representative of the  
Department of Trade and Commerce of the State of Nebraska,  
and W. A. Robinson, Jr., Defendants.

UNITED STATES OF AMERICA, *ss*:

To the above-named defendants, Greeting:

You are hereby cited and admonished to be and appear at the  
term of the United States Circuit Court of Appeals for the Eighth  
Judicial Circuit to be held at the City of Saint Louis in the State  
of Missouri, commencing on the fifth day of December, 1921, pur-  
suant to an order allowing an appeal filed and entered in the clerk's  
office of the United States District Court for the Omaha Division,  
District of Nebraska, from an order signed, filed and entered on the  
24th day of September, 1921, in that certain suit, being Equity No.  
308, wherein the above complainants are appellants and you are  
defendant and appellee, to show cause, if any there be, why the  
order entered against the said appellants, as in said order allowing  
appeal mentioned, should not be corrected, and why justice should  
not be done to the parties in that behalf.

52      Witness, the Honorable J. W. Woodrough, District Judge  
for the Omaha Division, District of Nebraska, this 24th day  
of September, 1921.

J. W. WOODROUGH,  
*United States District Judge for the  
Omaha Division, District of Nebraska.*



Service of above citation is hereby accepted and acknowledged this 24th day of September, 1921, in behalf of all defendants except Gurney, Kohl and Lion Bonding & Surety Co.

HALLECK F. ROSE,  
*Solicitor and Counsel for said Defendants.*  
 EDW. P. McDONALD,  
*Attorney for Lion Bonding & Surety Co.*  
 CHAS. C. BRANDT,  
 E. P. COWDREY,  
 H. C. LEIGH, &  
 R. A. MACKAY.

Endorsed: Filed in the District Court on September 26, 1921.

*(Præcipe for Transcript.)*

To the clerk of said court:

Please prepare transcript on appeal to the Circuit Court of Appeals, Eighth Circuit, in the above entitled action, as follows:

1. Bill of Complaint with exhibits thereto attached;
2. Two (2) affidavits of Bruce W. Sanborn, filed Sept. 26, 1921;
3. Motion of Department of Trade & Commerce et al. to dismiss;
4. Motion of Amos Thomas et al.,
5. Affidavit of Amos Thomas;
6. Order denying injunction and dismissing bill;
7. Assignment of errors; Petition for appeal and order allowing appeal; Bond on appeal; Citation; Præcipe for transcript; Clerk's certificate.

A. J. HERTZ AND  
 JOHN I. LEVIN,  
*As Receivers of the Lion Bonding &  
 Surety Company, Appellants.*  
 By SANBORN, GRAVES & ORDWAY,  
*Their Attorneys.*

53 Received copy of above præcipe this 26th day of September, 1921.

HALLECK F. ROSE,  
*Counsel for All Defendants Other Than  
 Gurney, Kohl, and Lion Bonding &  
 Surety Co.*  
 EDW. P. McDONALD,  
*Atty. for Defendants Leigh Brandt, Cowdrey, and Mackay.*

*Assent to Record Specified in Plaintiff's Præcipe.*

The defendants will file no præcipe for any additional record to be included in the transcript of the record on appeal in the above entitled cause.

HALLECK F. ROSE,  
*Counsel for Defendants Other Than Gurney,  
Kohl and Lion Bonding & Surety Company.*

Endorsed: Filed in the District Court on September 27, 1921.

*(Clerk's Certificate to Transcript.)*

UNITED STATES OF AMERICA,  
*District of Nebraska, ss.*

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, hereby certify that pursuant to the order of court and in compliance with the præcipe, a copy of which is found on page 85 hereof, the foregoing record has been made, and that the same is true and faithful transcript of the pleadings and proceedings on file and of record in said court, in the case of A. J. Hertz and John I. Levine, as receivers of the Lion Bonding and Surety Company, vs. Lion Bonding and Surety Company, et al. That a copy of the Citation duly certified has been lodged and remains in my office as such Clerk.

Witness my hand and the seal of said Court at Omaha, in said District this 27th day of September, A. D. 1921.

[Seal U. S. Dist. Court, Omaha Division, Dist. of Nebraska.]

R. C. HOYT,  
*Clerk.*

Filed Sept. 30, 1921.

E. E. KOCH,  
*Clerk.*

54 *(Stipulation to File and Add to Record Copy of Application  
for Injunction in District Court.)*

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5950.

A. J. HERTZ and JOHN T. LEVIN, as Receivers of the Lion Bonding  
& Surety Company, Appellants,

vs.

LION BONDING & SURETY COMPANY et al., Appellees.

It is hereby stipulated and agreed by and between the parties hereto that the notice of motion for injunction and acceptance of

service thereof, duly filed in the District Court of the United States, District of Nebraska, Omaha Division, in the above-entitled cause, may be filed and added to the record herein in this Court.

Dated this 28th day of December, 1921.

SANBORN, GRAVES & ORDWAY,  
*Solicitors for Appellants.*  
HALLECK F. ROSE,  
*Solicitor for Appellees.*

(Endorsed:) Filed in the U. S. Circuit Court of Appeals on Dec. 31, 1921.

*(Certified Copy of Notice of Application for Injunction in District Court.)*

In the District Court of the United States for the District of Nebraska, Omaha Division.

Equity.

No. 308.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding and Surety Company, Complainants,

vs.

LION BONDING AND SURETY COMPANY, E. R. GURNEY, H. C. LEIGH, E. P. McDonald, Dan F. Brown, Phil H. Kohl, Chas. C. Brant, F. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Department of Trade and Commerce of the State of Nebraska, and Amos Thomas, Personally and as the Agent and Representative of the Department of Trade and Commerce of the State of Nebraska, and W. A. Robinson, Jr., Defendants.

To Halleck F. Rose, Esq., Attorney for Defendants, Omaha, Nebraska, and Clarence A. Davis, Attorney General for Nebraska:

Please take notice that upon the Bill of Complaint heretofore filed in the above entitled action, and upon all the files and records therein, Complainants will move the above entitled Court at Chambers in the Federal Building, in the City of Omaha, State of Nebraska, on Saturday the 24th day of September, 1921, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendants herein and each of them from secreting, concealing or otherwise disposing of any of the assets of the defendant, Lion Bonding and Surety Company, and from interfering in any manner with the exercise by these complainants of control and possession of the property and assets and books and records of said defendant corporation, particularly such assets as are situated in the State of Nebraska, and

from in any manner interfering with the disposition of said property, and from bringing or maintaining any suit at law or in equity against any person for the recovery of any debt due the defendant corporation, or for the foreclosure of any mortgage or other lien held by said defendant upon the property of another, or for the recovery of the possession of any property of said defendant corporation; or from interfering in any manner with the management, control or possession by these complainants of the assets of said corporation or the possession of its books or records; and for an order directing the defendants and each of them to surrender all of the above named property in the possession of them or either of them, to these complainants as receivers.

Dated this 20th day of September, 1921.

SANBORN, GRAVES & ORDWAY,  
*Attorneys for Complainants.*

Service of the above Notice accepted.

Date: Sept. 21, 1921.

HALLECK F. ROSE,  
*Attorney for Defendant Amos Thomas, Personally and as Agent of Department of Trade & Commerce, State of Nebraska, & E. P. McDonald and W. A. Robinson, Jr..*

CLARENCE A. DAVIS,  
*Atty. Gen.,*

By T. J. McGUIRE,  
*Asst. Atty. Gen.*

Endorsed: Filed Sep. 24, 1921. R. C. Hoyt, Clerk.

56 UNITED STATES OF AMERICA,  
*District of Nebraska, ss:*

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, hereby certify the above and foregoing to be a true and correct copy of the Notice of Application for Injunction in Case No. 308 Equity, as the same appears on file and of record in my office.

Witness my hand, and the seal of said Court at Omaha, in said District, this 17th day of December, A. D. 1921.

[Seal U. S. Dist. Court, Dist. of Nebraska, Omaha Div.]

R. C. HOYT,  
By JOHN NICHOLSON,  
*Chief Deputy.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 31, 1921.

52

DEPT. OF TRADE, ETC., ET AL. VS. A. J. HERTZ ET AL.

57

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

*(Appearance of Counsel for Appellants.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 5950.

A. J. HERTZ et al., as Receivers, etc., Appellants,

vs.

LION BONDING & SURETY COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

BRUCE W. SANBORN.  
WILLIAM G. GRAVES.  
SAMUEL G. ORDWAY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1921.

*(Appearance of Mr. Halleck F. Rose, Mr. Amos Thomas, and Mr. George W. Pratt as Counsel for Appellees.)*

The Clerk will enter my appearance as Counsel for the Appellees.

HALLECK F. ROSE.  
AMOS THOMAS.  
GEORGE W. PRATT.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 18, 1921.

58 *(Appearance of Mr. Edward P. McDonald as Counsel for Appellees.)*

The Clerk will enter my appearance as Counsel for the Appellees.

EDW. P. McDONALD.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 18, 1921.

*(Appearance of Mr. Clarence A. Davis as Counsel for Appellees.)*

The Clerk will enter my appearance as Counsel for the Appellees.

CLARENCE A. DAVIS,  
*Attorney General for Nebraska.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 25, 1921.

59     *(Order of Submission of Causes Nos. 5902 and 5950 on Merits.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1921, Friday, January 13, 1922.

No. 5902.

LION BONDING AND SURETY COMPANY, a Corporation, Appellant,  
vs.

A. H. KARATZ.

Appeal from the District Court of the United States for the District of Minnesota.

and

No. 5950.

A. J. HERTZ et al., Receivers, etc., Appellants,

vs.

LION BONDING AND SURETY COMPANY et al.

Appeal from the District Court of the United States for the District of Nebraska.

These causes, Nos. 5902 and 5950, having been called for hearing in their regular order are argued together, and argument was commenced by Mr. Halleck F. Rose for the Lion Bonding and Surety Company, continued by Mr. Bruce W. Sanborn for A. H. Karatz and A. J. Hertz, et al., and concluded by Mr. Halleck F. Rose for the Lion Bonding and Surety Company.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Courts and the briefs of counsel filed herein.



United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1921.

No. 5950.

A. J. HERTZ et al., as Receivers, etc., Appellants,

vs.

LION BONDING & SURETY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

Mr. Bruce W. Sanborn (Messrs. Sanborn, Graves & Ordway, on the brief with him), for appellants.

Mr. Halleck F. Rose (Mr. Amos Thomas, Mr. George W. Pratt and Mr. Clarence A. Davis, Attorney General of Nebraska, on the brief with him), for appellees.

Before Stone, Circuit Judge, and Trieber and Munger, District Judges.

TRIEBER, *District Judge*, delivered the opinion of the court.

This cause arose out of the proceedings in No. 5902, Lion Bonding & Surety Co. v. A. H. Karatz, in which the opinion is filed this day.

After the refusal of this court to disapprove the appointment of the receivers, and the denial by the District Court for the District of Minnesota of the defendants' motion to dismiss the complaint in that action, the appellants, hereinafter referred to as the plaintiffs,

61 in pursuance of the authority granted to them by the court, which appointed them, filed this action in the court below, praying that it be adjudged by the decree of the court, that as against the defendants in this cause, the plaintiffs, receivers appointed by the District Court of Minnesota, have priority of right and the exclusive right to the possession of all the assets of the defendant Lion Bonding & Surety Company, its books and records, and that the defendant have no right to their possession and for an injunction in the usual form. In addition to the Bonding Company, the officers of the Company, the Department of Trade and Commerce of the State of Nebraska, Amos Thomas personally and as the agent and representative of that Department, and W. B. Young, the Chief of the Bureau of Insurance of the State of Nebraska are defendants.

The Complaint, after setting out the proceedings in the District Court for the District of Minnesota resulting in the appointment of the plaintiffs as receivers of the property and assets of the Bonding Company, their qualifications as such receivers, which are fully set

forth in our opinion in No. 5902, Lion Bonding & Surety Company v. A. H. Karatz, filed this day, and to which reference is made for the facts leading to the appointment of the receivers, alleges that, before their appointment as such receivers, on April 12, 1921, the defendant, the Department of Trade and Commerce, referred to herein as the Department, had filed in the District Court of Douglas County, State of Nebraska, its verified petition praying for an order directing it to take possession of the records, property, etc., of the said Bonding Company, which had, in the conduct of its business, violated the laws of the State, and conduct its business until such time, as after a hearing it shall appear to the court that the cause of the order, directing the Department to take possession, has been removed and that the Company can properly resume possession of the property, records, etc., and conduct its business. That said District Court of Douglas County upon the presentation of the petition made an order in conformity with the prayer of the petition, whereupon said Department of Trade and Commerce took into its possession the books of the Company, its cash, securities and other assets for the purposes set out in the order of that Court, and designated the defendant Thomas as its agent and representative to act for it; that after the appointment of plaintiffs as receivers by the

62 District Court of the United States for the District of Minnesota, the defendant company under the provisions of Section 56 of the Judicial Code, applied to the United States Circuit Court of Appeals for the Eighth Circuit to disapprove the appointment of said receivers, which was by said court denied. That the sole right of possession in said Department under said order of the District Court of Douglas County, Nebraska, was the right granted by the order of said court to the temporary possession of the property by the company for the conduct of its business. That on May 28, 1921, the Department filed in the District Court of Douglas County its further petition praying for an order authorizing the winding up and liquidation of the business of the company, which was by said court granted and defendants are proceeding to liquidate said assets. Exhibits of the proceedings in the State and National Courts are filed with and made a part of the complaint and also affidavits to sustain the allegations.

The defendants filed motions to dismiss, which are in effect identical with the grounds upon which the appeal in No. 5902 was prosecuted. They also pleaded the order of the District Court of Douglas County, made and entered on April 12, 1921. The motion to dismiss was by the court sustained, and a final decree dismissing the action entered. From this decree this appeal is prosecuted.

The only question not passed on in the opinion in No. 5902 was the power of the court below to grant the relief asked by the plaintiffs, by reason of the possession by the Department of the Company's property, books, etc., under the order of the District Court of Douglas County, made on April 12, 1921.

We held in No. 5902 that the possession by the Department was only for a temporary purpose. As the District Court of the United States for the District of Minnesota obtained jurisdiction and the

right to control by its receivers of the company's assets before the State Court had been asked or granted the order to wind up and liquidate the business of the Bonding Company and vest title to the property in the Department its right to the possession by its receivers is superior to that of the State Court. It follows that the receivers appointed by it are entitled to possession of the company's records and assets as against the Department of Trade and Commerce. The law is well settled that the court first obtaining jurisdiction in a pro-

ceeding to administer the property of an insolvent corporation has priority over other courts, attempting to take such possession thereafter. *Farmers' Loan & Trust Co. v. Lake Street Elev. R. R. Co.*, 177 U. S. 51; *Wabash R. R. Co. v. Adelbert College*, 209 U. S. 38, 54; *Palmer v. Texas*, 212 U. S. 118, 129; *McKinney v. Landon*, 209 Fed. 300, 126 C. C. A. 226; *Havner v. Hegnes*, 269 Fed. 537 (C. C. A. 8th Ct.).

The complaint states a good cause of action and the court below erred in sustaining defendants' motion to dismiss it. The decree is accordingly reversed with directions to the court below to set aside its order dismissing plaintiffs' bill, to reinstate such bill and to issue an injunction in favor of the appellants and against the appellees, restraining them and each of them, from removing, secreting or disposing of the moneys, books, papers, records, assets, property, accounts or choses in action, of or derived from the Lion Bonding and Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division.

Let the mandate in this case go forthwith.

Filed April 28, 1922.

64 (*Opinion in Cause No. 5902, Included in This Transcript Pursuant to Præcipe Filed by Counsel for Appellees in Cause No. 5950.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1921.

No. 5902.

LION BONDING & SURETY COMPANY, Appellant,

vs.

A. H. KARATZ, Appellee.

Appeal from the District Court of the United States for the District of Minnesota.

Mr. Halleck F. Rose (Mr. Amos Thomas, Mr. George W. Pratt, and Mr. Clarence A. Davis, Attorney General of Nebraska, were on the brief with him), for appellant.

Mr. Bruce W. Sanborn (Messrs. Sanborn, Graves & Ordway were on the brief with him), for appellee.

Before Stone, Circuit Judge, and Trieber and Munger, District Judges.

TRIEBER, *District Judge*, delivered the opinion of the Court.

The facts as they appear from the record in the case are:

On May 2, 1921, the appellee filed his complaint in equity in the District Court of the United States for the District of Minnesota on behalf of himself and all other parties similarly situated, who may desire to make themselves parties, against the appellant in which it was charged that appellee is a citizen of the State of Minnesota and appellant an insurance corporation organized under the laws of the State of Nebraska, admitted to do business in the State of Minnesota; that in pursuance to such authority, it has written a large amount of liability insurance and has outstanding in the state policies and obligations as surety exceeding \$100,000.00; that in payment of a loss in the State of Minnesota, for which it became liable in the sum of \$2,100.00 to one of its policyholders, a corporation created under the laws of the State of Minnesota, it gave, on April 19, 1921, a draft in the City of St. Paul, Minnesota, drawn by its duly authorized agent, on the home office of appellant in the City of Omaha, State of Nebraska, for said sum, which said draft became, by proper endorsement, in due course of business, for a valuable consideration, the property of appellee; that said draft was duly presented to appellant for payment and refused for the reason that appellant did not have sufficient funds to pay the same. The appellant has a large amount of personal property in the State of Minnesota of the value of at least \$20,000.00; that it has liabilities amounting to the sum of \$377,790.00, which it is unable to pay and has been denied the right to continue to do business in the States of Minnesota and Nebraska; that it is insolvent and there is great danger of the property being wasted and dissipated by litigation ensuing and about to ensue upon the large amount of unpaid claims owing; that various creditors are threatening to sue the company and collect their claims by executions, attachments or other legal proceedings, unless the court will take its property into its custody and appoint receivers for the purpose of converting its assets into money and distributing the same among its creditors. That the object of the action is for the purpose of closing up its business and causing a just and fair distribution of its property among its creditors. That appellant's property asked to be taken control of by the court, greatly exceeds in value the sum of \$3,000.00, exclusive of interest and costs.

The prayer of the bill is to appoint a receiver of appellant's property with the usual powers of a receiver, and an injunction, but does not ask that affairs of the corporation be wound up or that it be dissolved. That complaint was duly verified. Upon presentation of the complaint, the court, on May 2, 1921, granted the prayer of the complaint, appointed receivers, and authorized the plaintiff to apply to any other District Court for ancillary proceedings. The receivers

duly qualified. On May 14, 1921, appellant filed a motion to dismiss the complaint, upon two grounds.

1. That plaintiff's claim was only for \$2,100.00 and therefore insufficient to give the court jurisdiction.

66 2. That plaintiff is only a simple contract creditor on a claim not reduced to judgment, and without having exhausted his remedy at law.

It also filed at the same time, a motion to discharge the receivers and for a restoration of the property to its custody or the custody of the Department of Trade and Commerce of the State of Nebraska. The Department has not intervened in the cause and has presented no claim. The grounds relied on in this motion are that the court was without jurisdiction for the same reasons set out in the motion to dismiss the complaint, and the additional ground that the defendant is an insurance company, existing under the laws of that State, and the Governor, through the agency of the Department of Trade and Commerce is vested with power to regulate, supervise and control the business of insurance, and the corporations engaged in it. That said Department of Trade and Commerce, is charged with the duty of examining all insurance companies, and if necessary for the protection of the policyholders apply to the District Court of the County in which the company has its principal office for an order directing the company to show cause why the Department should not take possession of the property, etc., and conduct or close its business, and upon such application the District Court is vested with power to decree forthwith that said Department take possession of said property and retain possession thereof until after a hearing the court finds that the cause of such order has been removed, and on like application the court may order the liquidation of the business of such company, dissolve it and enjoin it from transacting business or disposing of the property. That before appellee filed his complaint in this action, viz: on April 12, 1921, in judicial proceedings had in the District Court of Douglas County, State of Nebraska, wherein the Department of Trade and Commerce was plaintiff and the appellant herein, defendant, that court entered an order directing the Department to take possession of appellant's property, and conduct its business until such time, as it shall appear, after a hearing that the cause of said order had been removed, and also enjoining the company from in any manner interfering with the conduct of the business by the Department and the usual injunctive orders made in such cases. That pursuant to said order the Department took immediate possession of the assets,

67 books, etc., of the Company for the purpose set out in the order and decree of the District Court of Douglas County, and has been conducting the business ever since. A transcript of the proceedings in the State District Court is filed with the motion as an exhibit. From this exhibit it appears that the allegations in the motion are true. The prayer of the complaint of the Department in that cause is:

"Wherefore, This Plaintiff, the Department of Trade and Commerce of the State of Nebraska, prays that this Court direct the Department of Trade and Commerce to take possession of the property, records and effects and conduct the business of the defendant corporation, the Lion Bonding and Surety Company, and retain such possession and conduct the business until such time as after a hearing it shall appear to the Court that the cause of the order directing the Department of Trade and Commerce to take possession has been removed, and that the Company can properly resume possession of its property, records and effects and the conduct of its business; and further prays that an order may issue forthwith from this Court, directing the defendant, the Lion Bonding & Surety Company to show cause why the Department of Trade and Commerce should not take possession of its property, records, and effects and conduct its business; and further prays that pending the return of such order to show cause and a hearing thereon, this Court may issue an order restraining the defendant, the Lion Bonding & Surety Company, from the transaction of its business, and from the disposition of any of its property, records and effects until the further order of this Court; and for such other and further relief as may to the Court seem just and equitable under the circumstances."

It also shows in an itemized report filed in the State District Court and which is a part of the exhibit filed in this cause, that the company is wholly insolvent, that its liabilities, in addition to the loss of the \$300,000.00 capital stock, exceed its assets by \$377,790.68.

On May 30, 1921, after a hearing, the motion of appellant to dismiss the complaint and to vacate the appointment of the receivers made on May 2, 1921, was by the court denied and from this order this appeal is prosecuted under Section 129 of the Judicial Code. Prior to the hearing on May 30, 1921, on the 14th day of May, 1921, the appellant presented to this court, which was then in session at St. Paul, a motion under Section 56 of the Judicial Code to disapprove the order appointing the receivers, which motion was heard by the Court, composed at the time of the lamented Circuit Judge Hook, Judge Neblett and the writer of this opinion. The grounds on which this motion was based were in effect the same as those set out in the assignment of errors on this appeal.

The court denied the motion on May 31, 1921, all the Judges concurring.

The assignments of error are:

#### I.

"The court erred in making and entering the order appointing receivers of the property of the Lion Bonding & Surety Company upon the application and bill of complaint of complainant, in that the bill of complaint showed on its face that the said court was without jurisdiction of the subject matter of said suit because the sum or amount in controversy therein is limited to \$2,100.00, and does not equal or exceed, exclusive of interest and costs the sum or amount of \$3,000.00.



## II.

"The court erred in making and entering the order appointing receivers of the property of the Lion Bonding & Surety Company, in that the bill of complaint of complainant showed on its face that the court was without power thereon to grant the equitable relief of appointment of receivers, the plaintiff claiming such equitable relief only as a simple contract creditor, without having reduced his claim to judgment, without having exercised or exhausted his remedy at law, and without presenting any specific lien upon or property interest of any sort in any of the said property of said Lion Bonding & Surety Company.

## III.

"The court erred in making and entering said order appointing receivers of all of the property of the Lion Bonding & Surety Company upon an ex parte application and without notice to or knowledge of said defendant corporation, there being shown no imperative necessity or emergency for such judicial action without notice.

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## IV.

"The said court erred in making and entering the order appointing said receivers of the property of said corporation in that the said suit is one of a local nature and the object and purpose of said bill as therein stated 'of closing up the business of said defendant' could only be granted and exercised by the courts of the state or district in which said corporation was created and wherein it is domiciled, namely the state and district of Nebraska; and for that purpose the power of said court for the District of Minnesota is secondary and ancillary only, and the primary jurisdiction to close up the business of the corporation within the territory of the state by which the corporation was created, resides in the courts exercising territorial jurisdiction therein."

Had the District Court jurisdiction of the cause, the plaintiff's claim not being in excess of \$3,000.00, although the funds to be taken charge of and administered for the benefit of the company's creditors, amounted to several hundred thousand dollars, the action being, not only for the benefit of the plaintiff, but all creditors of the company similarly situated?

This contention was ably presented by counsel at the former hearing on the motion to disapprove the appointment of the receivers and denied. The same contention was made in *Dill v. Supreme Lodge of Knights of Honor*, 226 Fed. 807, and *Cummings v. Supreme Council of Royal Arcanum*, 247 Fed. 992. The jurisdiction of the court in those cases was invoked by certificate holders of the defendants, fraternal insurance corporations, none of the certificates in either case exceeding \$3,000.00, but in each the jurisdiction was

sustained. In the *Knights of Honor* case it was expressly raised, the writer of this opinion having presided in that case, although the opinion, which was delivered orally at the conclusion of the hearing, does not mention it. But even had it not been raised, the courts of the United States being courts of limited jurisdiction, it would have been the duty of the court to dismiss the cause of its own motion, if not within its jurisdiction, even if the parties had by express consent sought to waive it. *Minnesota v. Northern Security Company*, 194 U. S. 48, 62; *C. B. & Q. Ry. v. Willard*, 220 U. S. 413, 419; *Chicago R. I. & Pac. Ry. Co. v. State of Nebraska*, 251 Fed. 279, 163 C. C. A. 435 (8th Ct.); *New York Life Ins. Co. v. Johnson*, 255 Fed. 985, 167 C. C. A. 250 (8th Ct.).

In the *Royal Arcanum* case the court dismissed the bill on the merits, which of course it neither would or could have done, if without jurisdiction to entertain the action. The record in that case, which the court examined, shows that the plaintiffs were holders of certificates of insurance, none of which exceeded \$3,000.00, and the liability of the defendant association on these certificates was only contingent, being payable on the death of the member, while in good standing.

We concur in the conclusion of Judge Booth in his memorandum of opinion that "the bond (evidently the property and books intended) sought to be taken possession of and distributed in the receivership on behalf of the plaintiff and other creditors, in my judgment is the amount involved for the purpose of determining the jurisdictional question".

## II.

The second assignment of error that the plaintiff is not entitled to the equitable relief of appointment of receivers, as he is only a simple contract creditor, without having reduced his claim to a judgment and exhausted his remedy at law is equally without merit. The facts alleged in the complaint, and which are admitted, are that, the company is wholly insolvent and its property in danger of loss and dissipation by reason of seizures under execution and attachments, and waste, to the great loss of the creditors, justified the action of the District Court to appoint receivers, without the necessity of useless proceedings at law. *Williams v. Adler-Goldman Comm. Co.*, 227 Fed. 374, 142 C. C. A. 70 (8th Ct.), affirming 211 Fed. 530, and authorities cited in the opinions of this case. As said in *Case v. Beauregard*, 101 U. S. 688, on like contentions: "Neither law nor equity requires a meaningless form, 'Bona, sed impossibilia non cogit lex'. It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite for equitable interference."

## III.

The allegations in the verified complaint show beyond question such an imperative necessity or emergency as required a court of

equity to appoint receivers on an ex parte application. If the  
 71 facts charged and upon which the receivers were appointed  
 had been put in issue by denials on the motion to discharge  
 the receivers, and had not been sustained by competent evidence  
 the court would undoubtedly have discharged them. The defendant  
 in its motion to discharge the receivers denied none of the allega-  
 tions in the complaint. All the defendant relied on in its motion  
 were the grounds set out in the assignment of errors now relied on  
 for a reversal of the order of the District Court.

#### IV.

The fourth assignment raises the important question whether in  
 view of the proceedings had in the District Court of Douglas County,  
 State of Nebraska, in the action instituted by the Department of  
 Trade and Commerce of that State against this defendant, prior to the  
 institution of this cause in the court below and the order of that  
 court, deprived the court below of jurisdiction to appoint the receivers,  
 and for this reason should have granted the motion of defendant  
 to discharge them and restore its property to the defendant or  
 custody of the Department of Trade and Commerce of the State of  
 Nebraska.

That in the absence of a statute, vesting the title to the property  
 of an insolvent in the receivers upon their appointment, such ap-  
 pointments give a receiver no right to the possession of the property  
 of the insolvent in another state, or if the appointment is made  
 by a national court of the property, in another district, is well set-  
 tled. The leading cases of the Supreme Court on that rule of law  
 is *Booth v. Clark*, 58 U. S. 322; *Great Western Mining Co. v. Har-  
 ris*, 198 U. S. 561, 575, followed ever since, not only by all national,  
 but all — courts. In *Rose's notes to Booth v. Clark*, the authorities  
 are collected, showing how uniform the decisions of the courts are  
 on that question. The latest case re-affirming this principle is  
*Sterret v. Second Nat'l Bank*, 248 U. S. 73, affirming 246 Fed.  
 753, 159 C. C. A. 55. But when the statutes of the state under  
 whose law as the corporation is created, vests the title to all prop-  
 erty of the defendant in the receivers, assignee or a State Board,  
 they are entitled to the possession wherever the property is situated.  
 In *Relfe v. Rundle*, 103 U. S. 222, 226, it was held that, as the In-  
 surance Commissioner of the State of Missouri, was by the laws of  
 that State, vested with the title of all the property and assets  
 72 of insolvent insurance corporations created by that State, the  
 Insurance Commissioner can maintain suits in the courts of  
 any State and recover the property, although in possession of a re-  
 ceiver appointed by a court of a foreign state. In *Bernheimer v. Con-  
 verse*, 206 U. S. 516, 534, and *Converse v. Hamilton*, 224 U. S. 243,  
 260, the same conclusions were reached under a statute of the State of  
 Minnesota, vesting in a receiver of an insolvent corporation the abso-  
 lute title to all its property, with power to sue in any court, includ-  
 ing those of a foreign jurisdiction. And this rule of law is recog-  
 nized by the Supreme Court of Nebraska, *Kinsler v. Casualty Co.*,  
 103 Nebr. 382, 172 N. W. 33.

Counsel for appellant contend that under the laws of the State of Nebraska the title to all the property of an insolvent insurance company, created by the laws of that state, no matter where situated, vests in the Department of Trade and Commerce, when upon an application to a District Court of the county, in which the principal office of the company is located, the court, by its order, places the property in the possession of that Department, and therefore this action is within the rulings in *Relfe v. Rundle*, supra, and the *Converse* cases. The statute relied on is the Act of 1919, Laws of Nebraska, 1919, pp. 573, et seq.

The provisions of that Act, on which counsel rely, are in Section 4 of that Act and are as follows:

"1. Whenever any domestic company is insolvent \* \* \* or is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policyholders, or to its creditors, or to its stockholders, or to the public; or has wilfully violated its articles of incorporation or association or any law of this state, or whenever any trustee, director, manager or officer thereof refuses to be examined under oath touching its affairs, the department of trade and commerce may apply to the District Court, or any judge thereof in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the department of trade and commerce should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders or the public may require.

73 "2. On such application, or at any time thereafter, such court or judge may, in his discretion, issue an order restraining such company from the transaction of its business, or disposition of its property, records, and effects, until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the department of trade and commerce forthwith to take possession and conduct the business until on the application of the department of trade and commerce, or of such company, it shall, after a like hearing, appear to the court that the cause of such order directing the department of trade and commerce to take possession has been removed, and that the company can properly resume possession of its property, records and effects, and the conduct of the business.

"3. If, on a like application and order to show cause and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the department of trade and commerce, which may deal with the property, records, effects and business of such company in the name of the department of trade and commerce, or in the name of the company as the court may direct, and it shall be vested, by operation of law, with title to all the property, effects, contracts and rights of action of such company as of the date of the order so directing it to liquidate. \* \* \*

Had the department proceeded in its action in the District Court of Douglas County under sub-section three of Section four of the Act, and the court had made an order in conformity with such an application, the contention of counsel could probably be sustained, a question not before us and therefore not passed on, but as shown by the transcript of the proceedings in that court filed by appellant, which is a part of the record in this case, the petition of the Department was under sub-section one and the order of the District Court of the State in conformity with sub-section two, which on the petition presented to it was the only relief prayed and therefore the only relief the court could grant. The order of the court, which is in strict compliance with the prayer of the bill and the statute, is

"It is therefore ordered, adjudged and decreed that the plaintiff herein, the Department of Trade and Commerce of the State of Nebraska, shall and is hereby ordered to take possession forthwith of the property, records and effects and conduct the business of the defendant company, the Lion Bonding & Surety Company, and retain such possession and conduct the business of said company until such time as, after a hearing, it shall appear to the Court that the cause of this order has been removed and that the company can properly resume possession of its property, records and effects, and the conduct of its business; and it is further ordered, adjudged and decreed that the Defendant Company, its officers, directors, stockholders, and employees, be, and are hereby enjoined and restrained from in any manner interfering with the said Department of Trade and Commerce, of the State of Nebraska in the carrying out of this order and in the taking possession of the property, records and effects, and in the conduct of the business of the defendant company, the Lion Bonding & Surety Company."

There is nothing in this order vesting the title to the property of the company in the Department, nor did the Department ask it in its petition.

Under that order the Department could neither claim possession of any property of the company out of the State of Nebraska, nor maintain an action for its recovery in any court other than one of or in the State of Nebraska. As the Company was admittedly insolvent, had large property interests in the State of Minnesota, within the jurisdiction of the court below, was unable to pay its debts, then due, its assets and property in imminent danger of being dissipated by reason of these conditions, the court, upon the application presented by the plaintiff's complaint, exercised proper discretion in appointing the receivers, and denying the motion of the defendant company to discharge them.

The decree is affirmed.

Let the mandate in this case go forthwith.

Filed April 28, 1922.

75 (Decree May 1, 1922, Vacated by Order of May 26, 1922.)

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1922, Monday, May 1, 1922.

No. 5950.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding  
and Surety Company, Appellants,

vs.

LION BONDING AND SURETY COMPANY, E. R. GURNEY, H. C. LEIGH,  
E. P. McDonald, Dan F. Brown, Phil H. Kohl, Charles C. Brandt,  
E. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Depart-  
ment of Trade and Commerce of the State of Nebraska, and Amos  
Thomas, Personally and as the Agent and Representative of the  
Department of Trade and Commerce of the State of Nebraska, and  
W. A. Robinson, Jr.

Appeal from the District Court of the United States for the District  
of Nebraska.

This cause came on to be heard on the transcript of the record from  
the District Court of the United States for the District of Nebraska,  
and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and  
decreed by this Court, that the decree of the said District Court, in  
this cause, be, and the same is hereby, reversed with costs; and that  
A. J. Hertz and John I. Levin, as Receivers of the Lion Bonding  
and Surety Company, have and recover against the Lion Bonding  
and Surety Company, E. R. Gurney, H. C. Leigh, E. P. McDonald,  
Dan F. Brown, Phil H. Kohl, Charles C. Brandt, E. P. Cowdrey,  
R. A. Mackay, W. B. Young, J. E. Hart, Department of Trade and  
Commerce of the State of Nebraska, and Amos Thomas, per-  
76 sonally and as the agent and representative of the Department  
of Trade and Commerce of the State of Nebraska, and W. A.  
Robinson, Jr., the sum of — Dollars for their costs in this behalf ex-  
pended and have execution therefor.

It is further ordered that the mandate of this Court in this cause  
issue forthwith to the said District Court.

May 1, 1922.

(Order Staying Mandate.)

May Term, 1922, Monday, May 1, 1922.

On motion and application of Mr. Bruce W. Sanborn, counsel for  
appellants, for a stay of the mandate of this Court to afford an op-  
portunity to present on May 22, 1922, or as soon thereafter as counsel  
can be heard, a motion to enlarge the opinion and decree of this



Court as to the directions for further proceedings in the District Court, It is ordered by this Court that the mandate in this cause, be, and the same is hereby, stayed until May 22, 1922, or until the further order of this Court.

May 1, 1922.

77 *(Motion to Enlarge Order as to Directions for Further Proceedings in District Court.)*

To the appellees herein and to Halleck F. Rose, Esquire, attorney for the appellees:

Please take notice that on the 22nd day of May, 1922, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, before the above court in the Federal Building at Saint Paul, Minnesota, the appellants in the above entitled action will move this honorable court that the order "Decree is accordingly reversed" appearing at the conclusion of the opinion of said Court in the above entitled case be enlarged so as to read substantially as follows:

"Let the decree below dismissing the bill of complaint and denying the motion for an injunction be reversed, and let this case be remanded forthwith to the court below with directions (1) to order that the appellees herein, and each of them, be required and directed forthwith to surrender the possession of and deliver to Messrs. A. J. Hertz and John H. Levin, receivers of said company, all of the books, records, credits, property and assets of the Lion Bonding and Surety Company, and all books, records, credits, property and assets which on May 11th, 1921 had come, or since that time have come, into the possession of said appellees, or either, or any of them, as individuals or in a representative capacity in connection with the affairs or business of the said Lion Bonding and Surety Company, and (2) to enjoin said defendants, and each of them, from secreting, concealing or otherwise disposing of any of said property and assets or from interfering in any manner with the exercise by the aforesaid

78 receivers of their right to the possession and control thereof and from disposing of said property or of acting in any manner with reference thereto, except to deliver the same over to said receivers.

SANBORN, GRAVES & ORDWAY,  
*Attorneys for Appellants.*

520 Endicott Building, Saint Paul, Minnesota.

(Endorsed:) Filed in U. S. District Court on May 10, 1922.

*(Acknowledgment of Service by Counsel for Appellees of the Motion to Enlarge Order as to Directions for Further Proceedings in District Court.)*

\* \* \* \* \*

(Copy of Motion to enlarge Order, etc., omitted at this place to avoid duplication.)

Received copy of above notice, May 8, 1922.

HALLECK F. ROSE,  
*Counsel for Appellees.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 16, 1922.

*(Affidavit of Bruce W. Sanborn in Support of Motion to Enlarge Order, etc.)*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

Bruce W. Sanborn, being duly sworn, on oath says: that he is a member of the firm of Sanborn, Graves and Ordway, Attorneys for the appellants in the above entitled action, being Case No. 79 5950, and that on or about May 11th, 1921, he talked with Amos Thomas, Special Agent of the Department of Trade and Commerce of the State of Nebraska, and asked him to turn over the assets of the Lion Bonding and Surety Company to the federal receivers, Messrs. A. J. Hertz and John I. Levin, appointed by Honorable Wilbur F. Booth; that said Thomas stated that he would vigorously contest any claim by said receivers to the possession of such property and would not relinquish such assets as were in his possession; that in the month of May or June, 1921, affiant requested of the said Thomas use of the files pertaining to matters within the jurisdiction of the Federal receivers, and was advised in effect that the request could not be granted, and that under date of July 14th, 1921, the federal receivers wrote said Thomas and asked for a statement of the assets of the company in the districts in which the federal receivers were qualified and acting and that the request was refused, the material parts of the correspondence being set out on pages 31 and 32 of the transcript in Case No. 5950, and that on June 28th at the suggestion of Honorable Wilbur F. Booth this affiant wrote the said Thomas asking if he would be willing to comply with a suggestion of Judge Booth of a transfer of a part of the assets to the federal receivers and received a reply, the material part of which is set forth on page 32 of the transcript in Case No. 5950 to the effect that compliance with said suggestion would not be made, and that on September 6th, 1921, the bill of complaint in Case No. 5950 was filed in the District of Nebraska, Omaha Division.

Further affiant saith not, except that this affidavit is made for the purpose of advising the court of the several demands made by this

affiant upon said Thomas for possession of such assets of the Lion Bonding and Surety Company as were held by him.

BRUCE W. SANBORN.

80 Subscribed and sworn to before me this 22nd day of May, 1922.

[SEAL.]

ERMEL McCLAY,

Notary Public, Ramsey County, Minn.

My commission expires Sept. 22, 1928.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 22, 1922.

(Affidavit of Amos Thomas in Opposition to Motion to Enlarge Order, etc.)

STATE OF NEBRASKA,

Douglas County, ss:

Amos Thomas being first duly sworn upon his oath says:

I am special agent of the Department of Trade and Commerce of the State of Nebraska in charge of the Lion Bonding & Surety Company, appellees in the above entitled case; my appointment as such has been approved by the District Court of Douglas County, Nebraska; that I qualified by giving a fidelity bond in a penal sum duly fixed and determined upon and have been in charge of said company at its home office in Omaha, Nebraska, continuously since the 12th day of April, 1921, pursuant to an order that day made and entered by the District Court of Douglas County, Nebraska.

The condition of the insolvency of said Lion Bonding & Surety Company and the impairment and loss of its capital, causes for which the District Court of Douglas County, Nebraska, ordered the Department of Trade and Commerce to take charge of the property and effects of said corporation have not been removed; no action whatever has been taken by its officers or stockholders to remove

81 the same and the conditions upon which alone under said order and the statutes of Nebraska, said Department of Trade and Commerce might lawfully relinquish the custody and control of the assets, property and effects of said corporation have not been performed.

The said District Court of Douglas County, Nebraska, on the 28th day of May, 1921, entered an order directing the Department of Trade and Commerce to liquidate the affairs of said Lion Bonding & Surety Company and to retain possession of its records, effects and properties for that purpose and continued the appointment of this affiant as special agent for that purpose as appears by the bill and the exhibits annexed thereto in this cause filed in the lower court. On or about the 31st day of December, 1921, the District Court of Douglas County, Nebraska, made and entered an order dissolving the Lion Bonding & Surety Company. For the purposes of the last mentioned orders and for the complete administration of the affairs and

assets of said Lion Bonding & Surety Company, the said District Court of Douglas County, Nebraska, in default of any action being taken for renewal of the cause for which said records, effects and properties have been ordered to be taken by the Department of Trade and Commerce continued its jurisdiction over the entire subject matter thereof including each and every of the above incidents and all of said proceedings were taken in the original cause or suit of the Department of Trade and Commerce against the Lion Bonding and Surety Company in which its jurisdiction attached April 12, 1921, and in which possession of such records, properties and effects was taken on said day.

The final order dismissing the bill of the appellants herein made and entered by the United States District Court for the District of Nebraska was, as is shown by the record, entered upon the motion of the defendants, appellees herein, to dismiss, and the appelless were not required to and did not therefore make any answer to the said

82 bill in the lower court. In view of the judgment of reversal heretofore made and entered by this honorable court on appeal adjudging that the said bill states a cause for equitable relief, it is the desire of the appellees to answer the said bill of complaint when the mandate of this court reaches the lower court so as to revest the lower court with jurisdiction, and affiant submits the right so to answer said bill should in the circumstances shown be granted almost as a matter of course and submits further that the particular form of the orders and specific equitable relief to be granted by the lower court should not be directed in anticipation of the answer or answers and the functions of the lower court as a court of original jurisdiction should not be superseded by specific directions.

The nominal assets of the Lion Bonding & Surety Company amount to \$2,135,479.47 on which as affiant believes there is collectible and should be collected upwards of \$400,000.00. It is submitted that the order of the District Court of Douglas County made April 28, 1921, for the liquidation of said corporation and the above mentioned order of dissolution which is competent to be made only by a domiciliary court, by operation of the Statutes of Nebraska mentioned in the opinion of this honorable court in this cause, vest title to all property of the Lion Bonding & Surety Company in the Department of Trade and Commerce of the State of Nebraska at least in all jurisdictions in which the receivers, Hertz and Levin, appointed by the District Court of the United States for the District of Minnesota, May 2, 1921, were not qualified as receivers at the date of the entry of said order of liquidation. Of the collectible assets of said Lion Bonding & Surety Company, upwards of \$80,000.00 are payable in the State of New York in which said receivers are not competent as suitors. Other assets are collectible in other states in which the said receivers were not and are not qualified as receivers including the United States District Court for the Southern District of Iowa, Hon. Martin J. Wade presiding, in which an order was entered denying the right and authority of said receivers to exercise authority

and jurisdiction within that district over the property of said company appointed by order of the District Court of the State of Iowa in and for Polk County, was adjudged to have the prior and exclusive authority of the property of said corporation in said district. The said receivers did not file in the office of the Clerk of said district within ten days of the date of their appointment copy thereof. The said receivers did not qualify by filing a copy of their appointment within ten days of its date in the Western District of Missouri and in said district a receiver was appointed ancillary to the proceedings of the District Court of Douglas County, Nebraska, on May 26, 1921. Receivers ancillary to the proceedings in the District Court of Douglas County have also been appointed to the States of Illinois and Michigan.

I qualified under my appointment as special agent in charge of the said Lion Bonding & Surety Company in faith of the order of the District Court of Douglas County, Nebraska, made April 12, 1921, twenty days prior to the appointment of Hertz and Levin by the United States District Court for the District of Minnesota and took charge of the records, properties and effects of said Lion Bonding & Surety Company prior to the appointment of said receivers and in discharge of my duties have employed under the directions of the order of the court to whom I was answerable, the necessary servants, agents and counsel and I respectfully submit that the cause in which said order was made was one of which the said District Court of Douglas County had by the statutes of the State of Nebraska, jurisdiction and that said state court has in any event the right and power to settle with its own appointees and agents and that opportunity for the appointees of said court to present its accounts in said proceeding for settlement should be reserved and saved and said appointees including myself should not be left to the hazard or risk of personal liability, suits or other burdens by a summary divestiture of the jurisdiction of said court in proceedings had in another jurisdiction. Proofs have been presented to me as an appointee of said state court and the Department of Trade and Commerce of 13,300 claims

against the Lion Bonding & Surety Company, the amount of which claims aggregate approximately \$898,000.00 and the record thereof is an incident not of the regular conduct of the business of said corporation but of the said administration proceeding conducted by the said District Court of Douglas County, Nebraska. I submit whether the large costs of duplicating the said records and proofs that would necessarily fall upon both the claimants and the estate being administered, might not be reasonably avoided through an appropriate application of the said state court and whether disposition of the proofs of said claims is not a matter wholly within the jurisdiction of the District Court of Douglas County, Nebraska.

I annex hereto a tabulated statement of the record assets of the Lion Bonding & Surety Company in each of the states in which said corporation was formerly licensed and admitted to transact business in many of which as aforesaid, the receivers are not qualified as suitors and in all of which as I am advised by counsel, the Department of Trade and Commerce of the State of Nebraska is by virtue

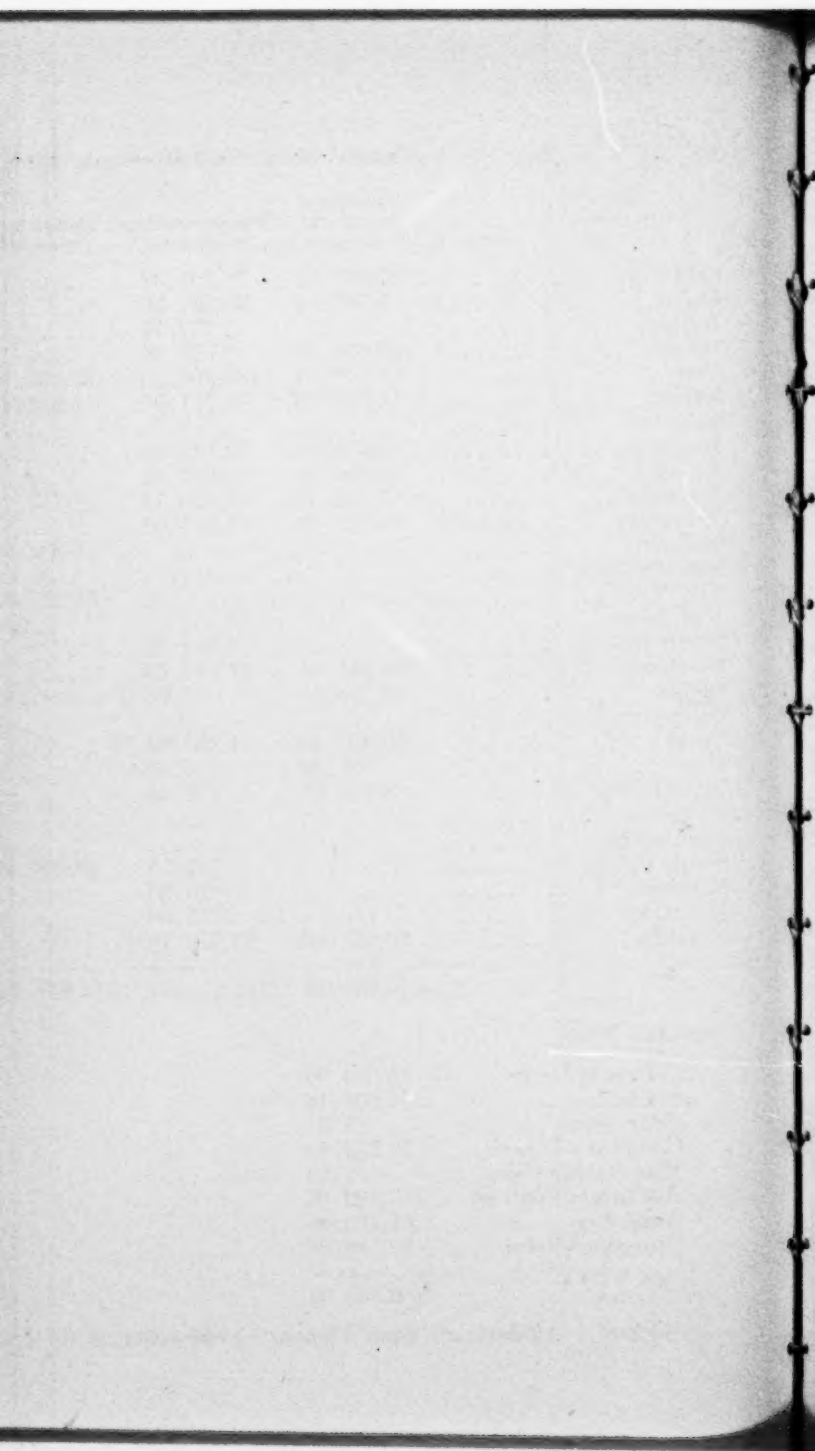


## (Tabulated Statement Showing Assets of Lion Bonding &amp; Surety Co. in States in Which it is Licensed to do Business.)

	Uncollected prems. and ret. comm.	Possible salvage recoverable.	Reinsurance recoverable.	Mtge. loans.	Bonds.	Real estate.	Warrants.	Tax bills.	Reins., ret. prems., and balances.	Totals.
California .....	32,087.57	38,391.42	.....	.....	.....	.....	.....	.....	.....	70,478.99
Idaho .....	5,565.64	24,591.35	.....	.....	.....	.....	25,705.51	.....	.....	55,862.50
Indiana .....	.....	1,732.77	.....	.....	.....	.....	.....	.....	.....	1,732.77
Illinois .....	55,654.30	9,965.84	.....	.....	.....	.....	.....	.....	.....	65,620.14
Iowa .....	28,866.51	135,396.20	37,193.05	.....	.....	.....	.....	.....	16,791.60	218,247.36
Kansas .....	15,863.78	12,797.07	9,912.61	.....	.....	.....	.....	.....	5,662.07	44,235.53
Louisiana .....	.....	.....	.....	.....	.....	.....	.....	.....	38.51	38.51
Michigan .....	33,669.86	32,125.68	.....	.....	.....	.....	.....	.....	.....	65,795.54
Missouri .....	30,694.25	63,843.02	.....	.....	.....	.....	.....	10,354.27	.....	104,891.54
Montana .....	5,446.72	53,830.14	21,765.26	.....	.....	.....	.....	.....	175.68	81,217.80
Minnesota .....	90,363.23	176,481.35	.....	.....	.....	.....	9,532.03	.....	.....	276,376.61
Maryland .....	.....	.....	6,591.90	.....	.....	.....	.....	.....	4,509.36	11,101.26
Massachusetts .....	.....	.....	.....	.....	.....	.....	.....	.....	1,201.61	1,201.61
New York .....	.....	.....	89,082.01	.....	.....	.....	.....	.....	45,452.45	134,534.46
New Jersey .....	.....	.....	.....	.....	.....	.....	.....	.....	12.50	12.50
North Dakota .....	.....	9,882.61	.....	.....	.....	.....	.....	.....	1,388.53	11,271.14
Oklahoma .....	30,944.64	47,146.20	.....	.....	.....	.....	.....	.....	.....	78,090.84
Oregon .....	33,720.59	63.00	.....	10,000.00	.....	.....	.....	Vendors Liens	.....	43,783.59
Pennsylvania .....	.....	.....	.....	.....	.....	.....	.....	.....	30.56	30.56
Texas .....	50,065.16	91,373.93	.....	.....	50,000.00	8,625.00	.....	3,345.00	253.42	203,662.51
Utah .....	377.43	370.40	.....	.....	.....	4,800.00	.....	.....	.....	5,547.83
Washington .....	8,358.35	175.40	.....	.....	.....	.....	.....	.....	.....	8,533.75
Wisconsin .....	.....	.....	.....	.....	.....	.....	.....	.....	166.98	166.98
Connecticut .....	.....	.....	.....	.....	.....	.....	.....	.....	185.53	185.53
South Dakota .....	.....	737.75	20,366.65	.....	.....	.....	.....	.....	17.65	21,122.05
Mississippi .....	.....	20.25	.....	.....	.....	.....	.....	Chattel Mtgs.	.....	20.25
Wyoming .....	.....	375.00	.....	.....	.....	6,000.00	.....	.....	.....	6,375.00
Nebraska .....	29,253.15	83,572.45	.....	194,297.50	20,600.00	8,000.00	7,970.21	1,080.00	.....	625,342.32
	450,931.18	782,871.83	184,911.48	204,297.50	70,600.00	27,425.00	43,207.75	14,779.27	75,886.45	2,135,479.47
Nebraska Misl.:										
Collateral Loans....	16,000.00									
Stocks .....	57,096.18									
Petty Cash .....	29.61									
Certificates Deposit..	18,259.42									
War Saving Cert....	118.53									
Advance on Contract.	117,392.97									
Accts. Rec. ....	61,486.26									
Unsecured Notes ...	10,186.04									
	280,569.01									

(Endorsed:) Affidavit of Amos Thomas in opposition to Motion to enlarge, Order, etc. Filed in U. S. Circuit Court of Appeals, May 22, 1922.





of the proceedings of said District Court of Douglas County, Nebraska, qualified to maintain the rights originally accruing to said corporation as a statutory successor under the laws of Nebraska. The said tabulated statement here referred to has been compiled from the records of said corporation and trust now in my hands at its office in Omaha and to the best of my knowledge and belief the said statement is correct. I submit to the court whether in any event the functions of administering the assets of said corporation in districts in which the said receivers are not qualified and the custody of the same or the evidences thereof may be justly denied to the Department of Trade and Commerce of the State of Nebraska and vested in said receivers in view of the premises and whether a consideration of whether any order made in that behalf and any limitations or conditions annexed thereto ought not to be referred to the lower court to be determined after the filing of answers and the proofs  
85 adduced in original proceedings rather than upon directions in appellate proceedings under a judgment which reversed the order based upon a holding that the bill did not state facts sufficient to constitute a cause of action.

Further affiant sayeth not.

AMOS THOMAS.

Subscribed in my presence and sworn to before me this 20th day of May, 1922.

[SEAL.]

PAULINE J. CRANE,  
*Notary Public.*

(Here follows tabulated statement, marked page 86.)

87     *(Order of Submission of Motion of Appellants to Amend Opinion and Decree.)*

May Term, 1922, Monday, May 22, 1922.

Before Judges Carland, Trieber, and Munger.

This cause came on this day to be heard upon the motion of appellants to amend the opinion and decree of this Court as to the directions for further proceedings in the Court below, and upon the affidavits in support of and in opposition to said motion. After hearing argument by Mr. Bruce W. Sanborn in support of the motion and by Mr. Halleck F. Rose in opposition thereto, the said motion and affidavits were by the Court taken under advisement.

*(Order as to Submission of Motion to Amend Opinion and Decree.)*

May Term, 1922, Thursday, May 25, 1922.

Before Judges Carland, Trieber, and Munger.

The motion of appellants in this cause to amend the opinion and decree of this Court, with affidavits in support of and in opposition thereto, having heretofore been submitted to this Court, composed of Judges Carland, Trieber and Munger, said submission to Judge Carland is now vacated and instead said motion and affidavits are now submitted without oral argument to Judge Stone as the third Judge.

88     *(Order Amending Opinion, Vacating Decree of May 1, 1922, and for Entry of New Decree.)*

May Term, 1922, Friday, May 26, 1922.

Before Judges Stone, Trieber, and Munger.

Appellants have filed a motion to add to the opinion of this Court directions to the court below from which this appeal was taken, as to what course to pursue. Section 56 of the Judicial Code provides that the receiver "so appointed shall, upon giving bond as required by the Court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit." It then further provides that such order is subject to the disapproval within thirty days thereafter by the Circuit Court of Appeals for such circuit or by a Circuit Judge thereof. It further provides that such order is subject also to the filing and entering in the District Court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and the order of the appointment. A duly certified copy of the bill and the order of the appointment of the receivers was filed in the District Court of the United

States for the District of Nebraska, Omaha Division, within ten days of the appointment of the receivers. In view of these facts we are of the opinion that the District Court for the District of Minnesota has the exclusive jurisdiction of this cause, and its receivers are entitled to the possession and control of all the property; the subject of the suit, lying or being within the District of Nebraska, and the District Court for the District of Nebraska has only jurisdiction in aid of the District Court for the District of Minnesota.

There will therefore be added to the opinion heretofore filed in this cause the following: "with directions to the court below  
89 to set aside its order dismissing plaintiffs' bill, to reinstate such bill and to issue an injunction in favor of the appellants and against the appellees, restraining them and each of them, from removing, secreting or disposing of the moneys, books, papers, records, assets, property, accounts or choses in action, of or derived from the Lion Bonding and Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division."

It is further ordered that the decree of this Court entered on May 1, 1922, in accordance with the opinion as then filed be, and the same is hereby, vacated, set aside and held for naught and that a new decree be now entered in accordance with the opinion of this Court as amended by this order.

May 26, 1922.

(Decree, May 26, 1922.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1922, Friday, May 26, 1922.

No. 5950.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding and Surety Company, Appellants,

vs.

LION BONDING AND SURETY COMPANY, E. R. Gurney, H. C. Leigh, E. P. McDonald, Dan F. Brown, Phil H. Kohl, Charles C. Brandt, E. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Department of Trade and Commerce of the State of Nebraska, and Amos Thomas, Personally and as the Agent and Representative of the Department of Trade and Commerce of the State of Nebraska, and W. A. Robinson, Jr.

90 Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that A. J. Hertz and John I. Levin, as Receivers of the Lion Bonding and Surety Company, have and recover against the Lion Bonding and Surety Company, E. R. Gurney, H. C. Leigh, E. P. McDonald, Dan F. Brown, Phil H. Kohl, Charles C. Brandt, E. P. Cowdrey, R. A. Mackay, W. B. Young, J. E. Hart, Department of Trade and Commerce of the State of Nebraska, and Amos Thomas, personally and as the agent and representative of the Department of Trade and Commerce of the State of Nebraska, and W. A. Robinson, Jr., the sum of One Hundred Fifty-One and 75/100 Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside its order dismissing plaintiffs' bill, to reinstate such bill and to issue an injunction in favor of the appellants and against the appellees, restraining them and each of them, from removing, secreting or disposing of the moneys, books, papers, records, assets, property, accounts or choses in action, of or derived from the Lion Bonding and Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division.

And it is further ordered that the mandate of this Court in this cause issue forthwith to the said District Court.

May 26, 1922.

91      (*Præcipe for Transcript for Use on Application to Supreme Court of the United States for a Writ of Certiorari.*)

To the Clerk of said court:

Please make and deliver to us, prepared in form suitable for presentation with a petition for a writ of certiorari to the Supreme Court of the United States:

1. A certified copy of the transcript of the record, including all proceedings in the United States Circuit Court of Appeals for the Eighth Circuit;

2. And including a copy of the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in case No. 5902, Lion Bonding & Surety Co. v. Karatz;

3. And including, and accompanying the same, ten uncertified copies of the record, containing all proceedings of the said United States Circuit Court of Appeals.

STOUT, ROSE, WELLS & MARTIN,  
HALLECK F. ROSE,

*Counsel for Appellee.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 10, 1922.

*(Clerk's Certificate.)*

## United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for appellees, in a certain cause in said Circuit Court of Appeals wherein A. J. Hertz, et al., as Receivers, etc., were Appellants, and the Lion Bonding and Surety Company, et al., were Appellees, No. 5950, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-sixth day of May, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals, directed to the Judges of the District Court of the United States for the District of Nebraska.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of June, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,  
*Clerk of the United States Circuit Court of  
Appeals for the Eighth Circuit.*



In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5950.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the Lion Bonding and Surety Company, Appellants,

vs.

LION BONDING AND SURETY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

*Stipulation.*

The parties hereto hereby stipulate and agree that the record herein now on file in the office of the Clerk of the Supreme Court of the United States, upon which the petition for a writ of certiorari was presented and granted, may be taken as a return to said writ of certiorari, and that the Clerk send to said Supreme Court a certified copy of this stipulation as his return to the writ of certiorari granted by said Supreme Court herein.

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,

*Counsel for Appellants.*

JOHN F. STOUT,  
HALLECK F. ROSE,  
ARTHUR R. WELLS,  
PAUL L. MARTIN,

*Counsel for Appellee.*

(Endorsed:) No. 5950. In the United States Circuit Court of Appeals for the Eighth Circuit. A. J. Hertz and John I. Levin, as Receivers of the Lion Bonding and Surety Company, Appellants, vs. Lion Bonding and Surety Company et al., Appellees. Appeal from the District Court of the United States for the District of Nebraska, Stipulation as to return to Writ of Certiorari. Filed Nov. 15, 1922. E. E. Koch, Clerk.

94 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which A. J. Hertz et al., as Receivers etc., are appellants, and Lion Bonding and Surety Company et al. are appellees, No. 5950, which

suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the

Supreme Court of the United States, do hereby command  
95 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

*Clerk of the Supreme Court of the United States.*

96 & 97 [Endorsed:] File No. 29,017. Supreme Court of the United States, October Term, 1922. No. 467. Department of Trade and Commerce of the State of Nebraska et al. vs. A. J. Hertz et al., as Receivers etc. Writ of Certiorari. Filed Nov. 15, 1922. E. E. Koch, Clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,

*Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of A. J. Hertz, et al., as Receivers, etc., Appellants, vs. Lion Bonding & Surety Company, et al., No. 5950, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of November, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.*

98 [Endorsed:] File No. 29,017. Supreme Court U. S., October Term, 1922. Term No. 467. Department of Trade and Commerce of Nebraska et al., Petitioners, vs. A. J. Hertz et al., as Receivers etc. Writ of certiorari and return. Filed Nov. 21, 1922.

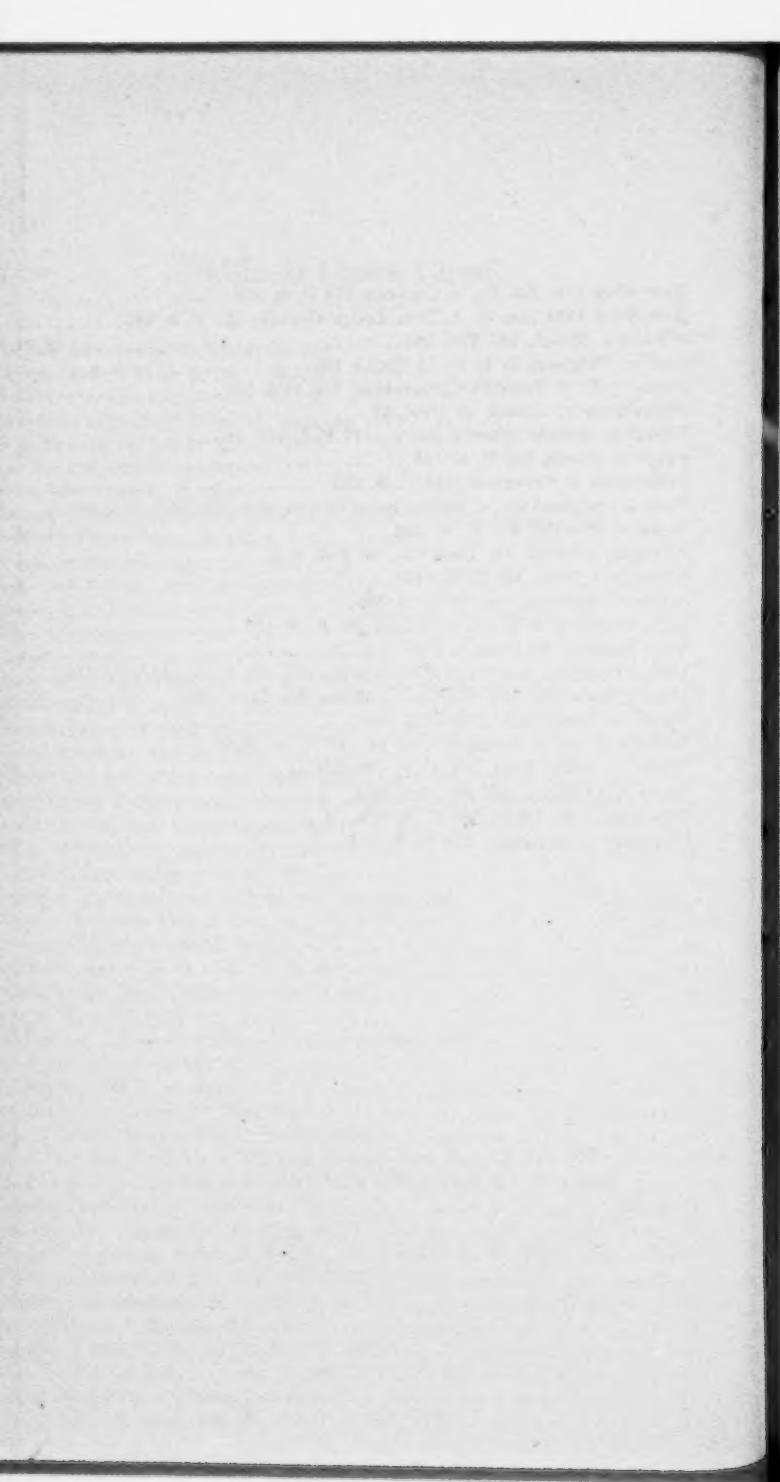
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# Supreme Court of the United States

October Term, 1922

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No. 467

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DEPARTMENT OF TRADE AND COMMERCE OF THE  
STATE OF NEBRASKA, ET AL., *Petitioners,*

v.

A. J. HERTZ AND JOHN I. LEVIN, AS RECEIVERS  
OF THE LION BONDING & SURETY COMPANY,  
*Respondents.*

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No. 574

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LION BONDING AND SURETY COMPANY, *Petitioner,*

v.

A. H. KARATZ, *Respondent.*

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WRITS OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

---

BRIEF OF PETITIONERS

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I.

## STATEMENT OF THE CASE

The two cases concern the administration and liquidation of The Lion Bonding and Surety Company, an incor-

porated insurance company organized under the laws of Nebraska, now insolvent. Both cases were advanced and set for hearing on the same day, and both are presented together by petitioners on one brief.

The State of Nebraska, which created, chartered and licensed The Lion Bonding and Surety Company, by the *Department of Trade and Commerce*, in judicial proceedings in the State District Court for Douglas County, took charge of its property and affairs for the purpose of dealing with it as a delinquent and insolvent domestic insurance company, pursuant to state statutes regulating such companies and regulating the business of insurance. The statutes are presented at another place in this brief. (pp. 59-63.)

The proceedings under review on the present writs, the initiation of which were *subsequent* in point of time to those taken by the state in the state court, oust the state of its prior possession and control of the property and affairs of the insolvent and delinquent corporation of its own creation and arrests by injunction all proceedings in the prior suit in the state court, and in collateral proceedings adjudge void the judicial orders of the state court. A statement containing a summary of the proceedings had in the several courts asserting, concurrently, custody and control of the *res* will prove the accuracy of this foundation statement. We first exhibit the proceedings of the state court so far as brought into the present records.

#### **Proceedings in the State District Court of Douglas County**

The record in No. 574, *Lion Bonding & Surety Co. v. Karatz*, shows the presentation to the United States District Court for the District of Minnesota of a motion to discharge the receivers, and the presentation therewith of an exempli-

fied copy of judicial proceedings previously had in the District Court of Douglas County, Nebraska. (Printed Record, case No. 574, pp. 31-77.)

That record certifies that April 12, 1921, a petition was filed in the state court by the *Department of Trade and Commerce of the State of Nebraska* as plaintiff, against *The Lion Bonding & Surety Company*, as defendant, in which it was averred, among other things, as follows:

(1) That The Lion Bonding & Surety Company is a corporation organized and existing under the laws of Nebraska, to transact the business of insurance under the laws of said state, and is licensed by the Bureau of Insurance of the Department of Trade and Commerce to transact such business.

(2) That the Bureau of Insurance, by virtue of authority vested in it by law had made an examination of said company, in which examiners of the Insurance Departments of Iowa, Minnesota, Kansas and Idaho had joined. The examiners reported findings and recommendations based upon such examination, copies whereof are attached to and made part of the petition.

(3) The Lion Bonding & Surety Company was found to be, and is, in such condition that its further transaction of business would be hazardous to its policyholders, its stockholders, its creditors and the public, in that the surplus has been dissipated and reduced. A computation of its assets and liabilities made according to the insurance laws of Nebraska, shows that such company is now *without capital or surplus*, that the company is *insolvent* and unable to pay its claims or to meet its liabilities to creditors or stockholders.

(4) The corporation has violated the laws of Nebraska in accepting as part of its assets, bonds and notes secured by first mortgage on real estate in this and other states which were not worth at least double the sum loaned thereon, specification whereof appears in the report of the insurance examiners.

(5) The corporation has violated the laws of Nebraska by "kiteing checks", the process of which is described and detailed in the report referred to.

(6) Plaintiff prayed for an order directing The Department of Trade and Commerce to take possession of the property, records and effects, and retain such possession till on a hearing it shall appear that the cause of the order has been removed, for an injunction against transacting business and disposing of corporate property until the further order of court and for such other and further relief as may to the court seem just and equitable under the circumstances. (Printed Record, Case No. 574, pp. 31-34.)

We shall show, in course of the argument, that the allegations noted embrace all of the statutory jurisdictional requirements for vesting in the State District Court the entire subject matter of dealing with the defendant as a delinquent and insolvent insurance company, including its liquidation through The Department of Trade and Commerce and its dissolution; and also that the form of the prayer for general relief was of *statutory authorization*.

April 12, 1921, the day on which the foregoing petition was filed in the state court, The Lion Bonding & Surety Company, defendant, appeared and filed its answer confessing the allegations of the petition, except as to paragraph 5 thereof, consented to be placed in charge of the Department of Trade and Commerce, and joining in the prayer of the petition to that end. (Printed Record, Case No. 574, p. 78.) The answer was accompanied by a resolution of the board of directors authorizing the attorney of the corporation to cooperate with the state department to that end and to file an answer in the District Court of Douglas County, Nebraska, to fully and completely enable the Department of Trade and Commerce under section 3147, Art. 3, Tit. 5, Ch. 190, Laws 1919, "either to temporarily administer, or to liquidate and

wind up its affairs, as in the judgment of the Department may seem proper." (Printed Record, Case No. 574, p. 79.)

April 12, 1921, the same day on which the petition and answer were filed, the District Court of Douglas County, Nebraska, made an order that *The Department of Trade and Commerce of the State of Nebraska* take possession forthwith of the property, records and effects and conduct the business of The Lion Bonding & Surety Company, "and retain such possession and conduct the business of said company until such time as, after a hearing, it shall appear to the court that the cause of this order has been removed and that the company can properly resume possession of its property, records and effects, and the conduct of its business; and it is further ordered, adjudged and decreed that the defendant company, its officers, directors, stockholders and employees, be, and are hereby enjoined and restrained from in any manner interfering with the said Department of Trade and Commerce of the State of Nebraska in the carrying out of this order, and in taking possession of the property, records and effects, and in the conduct of the business of defendant company, The Lion Bonding & Surety Company." (Printed Record, Case No. 574, pp. 80-81.)

The bill of *Hertz and Levin*, as receivers, filed in the United States District Court for the District of Nebraska, September 6, 1921, shows, in paragraph 3, that The Department of Trade and Commerce, through Amos Thomas, whom it appointed and designated for that purpose, entered upon its duties imposed by the order of the state court, and was, at the date of the bill, "in the control, management and direction of said corporation." (Printed Record, Case No. 467, pp. 2-9.)

The bill of *Hertz and Levin* also shows numerous proceedings and orders had and made in the state court, from

time to time, appropriate to the administration proceeding of which it had on April 12, 1921, taken cognizance. Among these proceedings their bill sets forth the following:

May 28, 1921, the Department of Trade and Commerce filed a petition in the state court, reporting, among other things, "that the stockholders have failed, neglected and refused to remove any deficiency or embarrassment of the capital," and praying for an order to wind up and liquidate the business of the corporation, and continuing the employment of special agents and employees. The petition was accompanied by proof of service of a notice of the date of hearing, and an answer was filed by defendant on the day the petition was filed. On the same day a formal order was made and entered by the state court, that the business of The Lion Bonding & Surety Company be liquidated under the direction of said Department, subject to the orders and directions of the court as the same may be entered from time to time, and authorizing and directing the Department of Trade and Commerce "to do all things necessary to properly liquidate said Company, to marshall its assets, and dispose the same to the persons entitled thereto, under the supervision and direction of the court." And all previous appointments of special agents and assistants were continued in effect. (Printed Record, Case No. 467, pp. 17-21.)

**Proceedings in the United States District Court, District of Minnesota.**

May 2, 1921, twenty days after the *Department of Trade and Commerce of the State of Nebraska* had taken possession of the property, records and effects of The Lion Bonding & Surety Company, under a judicial order and decree of the State District Court, for the purpose of dealing with it as a delinquent and insolvent domestic insurance company, pursuant to the state statutes regulating insurance and in-



surance companies, chancery receivers were appointed for the company and its properties by the United States District Court for the *District of Minnesota*. (Printed Record, Case No. 574, pp. 23-24.) The United States District Judge, when he so appointed receivers, had no knowledge that a court of the domicile of the corporation had taken cognizance of the same subject matter or had, through a local statutory appointee, seized the corporate assets. (Opinion of District Judge, Case No. 574, p. 105.)

The subsequent order appointing receivers by the Federal Court for the District of Minnesota, in terms vested them with extra territorial powers throughout the Eighth Judicial Circuit, including the District of Nebraska. The order was made without notice to defendant, on an *ex parte* presentation of a bill by *A. H. Karatz*, a simple contract creditor, having a claim of only \$2,100.00, and was entered on the day the bill was filed.

The Lion Bonding & Surety Company filed a motion in the *Karatz case* in the Minnesota District to dismiss the bill, assigning (1) that on the face of the bill the jurisdictional amount of \$3,000.00 was not involved, and (2) a court of equity had no jurisdiction because plaintiff sued on a simple contract debt, not reduced to judgment, and without having first resorted to his legal remedy, and did not assert any specific lien or property interest in the property sought to be administered through a chancery receivership. (Printed Record, Case No. 574, p. 26.)

The Lion Bonding & Surety Company also filed in the *Karatz case* in the Minnesota District a motion to discharge the receivers, assigning (1) that the appointment was made without notice and without necessity for immeditation action; (2) that on the face of the bill the court was without juris-

diction to appoint receivers, for want of the requisite jurisdictional amount in controversy and for want of equitable jurisdiction in that plaintiff was a simple contract creditor and had no lien upon or interest in the property of the defendant corporation; (3) that the *res* were in the prior custody and control of the District Court of Douglas County, Nebraska, in judicial proceedings had in exercise of a special jurisdiction conferred on that court, the nature of which was set forth in detail, and proved by a copy of the record certified in conformity to the governing act of Congress; and that custody and the control of the state court over the subject matter was exclusive; and (4) that the action was of a local nature of which the courts of the domicile of the corporation had exclusive cognizance. (Printed Record, Case No. 574, pp. 26-29.)

May 30, 1921, the said motions (1) to dismiss the bill, and (2) to discharge the receivers, were both denied. (Printed Record, Case No. 574, pp. 99-100.)

May 30, 1921, within the 30 days from entry of the order appointing the receivers, limited by Section 129 of the Judicial Code, the Lion Bonding & Surety Company presented an appropriate petition, accompanied by an assignment of errors, and obtained the allowance by the District Judge of an appeal from the interlocutory order appointing receivers. (Printed Record, Case No. 574, pp. 101-103.)

That order having been made on an *ex parte* application appellant was, necessarily, restricted to such grounds of error as appeared on the face of the Karatz bill, and the points assigned were: (1) Want of the requisite jurisdictional sum; (2) Want of equitable jurisdiction; (3) Making the appointment on a *ex parte* application, without notice to defendant and without showing of any imperative necessity

or emergency; and (4) that the action was local in its nature of which the domiciliary court has exclusive cognizance.

It will be observed that Section 129 of the Judicial Code under which the appeal was taken from the interlocutory order appointing receivers, does not authorize an appeal from or review of the motion to discharge the receivers. This is obvious on the face of the statute and was expressly ruled by the Circuit Court of Appeals for the Eighth Circuit in *Guardian Trust Co. v. Shedd*, 240 Fed. 689. Agreeably to this precedent, no assignment of error was, on this appeal, directed against the order denying the motion to discharge the receivers, in which the question of conflict of judicial authority, not appearing on the face of the Karatz bill, was raised. That question could only be reviewed on an appeal from a final decree. Appellant's praecipe for the record on appeal included only the bill, order appointing receivers and bond of receivers, in addition to the proceedings necessary for perfecting the appeal. The other proceedings on the motions, though not relevant to the points urged in the appeal from the interlocutory order, were brought into the record by praecipe of the appellee. (Printed Record, Case No. 574, p. 107.)

August 11, 1921, defendant having stood on its motions, a final decree was entered, adjudicating Karatz' claim for \$2,100.00, the maximum claimed, continuing the powers of the receiver to administer the property of defendant corporation, and granting a perpetual injunction restraining defendant and its agencies from interfering with the control and possession of any part of the property of defendant. (Printed Record, Case No. 574, pp. 1-4.)

October 31, 1921, an appeal was taken from the final decree to the Circuit Court of Appeals. (Printed Record,

Case No. 574, pp. 4-8.) An order was entered permitting use of the printed record on the previous appeal. (Printed Record, p. 14.) Upon a hearing the Circuit Court of Appeals affirmed the judgment of the District Court. (Printed Record, p. 16.)

The present writ brings the last stated judgment here for review. Since the errors there assigned against the affirmed final judgment of the United States District Court for the District of Minnesota are the basis of those presented under the present writ of certiorari, we present them here in full:

**Assignment of Errors on the Appeal from Final Decree in the Karatz Case.**

I. The court erred in making and entering the order of May 30, 1921, denying the motion of defendant to dismiss the bill of complaint of complainant.

II. The court erred in making and entering the order of May 30, 1921, denying the motion of defendant to vacate the order made and filed on May 2, 1921, appointing A. J. Hertz and John I. Levin as receivers of all of the property and assets of defendant, and to discharge said receivers.

III. The court erred in adjudicating that the sum of \$2,100.00 is due plaintiff from defendant and in decreeing that the same be paid out of the assets of defendant coming into the hands of the receivers appointed by said court, in due course of administration.

IV. The court erred in decreeing to be permanent the appointment of A. J. Hertz and John I. Levin as receivers of defendant, and in continuing their powers as prescribed in the order appointing them.

V. The court erred in perpetually enjoining and restraining the defendant, its several agencies, and all other persons whomsoever, from interfering in any manner whatsoever, with the possession and control of its said receivers over any part of defendant's property.

VI. The court erred in that its said order denying appellant's motion to discharge the receivers, and its decree adjudicating complainant's claim and decreeing its payment out of moneys coming to the hands of said receivers in due course of administration, making permanent the appointment of said receivers and continuing their powers, and perpetually enjoining defendant and its agencies and all other persons from interfering with their possession and control of any part of appellant's property, and all and each one of said several orders and proceedings operate to disregard and deny full faith and credit to the public acts and judicial proceedings of the State of Nebraska in violation of Section 1 of Article 4 of the Constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," in the particulars following: By the provisions of the Civil Administrative Code of Nebraska, and of Article 3, Section 4 thereof, Laws of Nebraska, 1919, pages 576 to 581, both inclusive, and the judicial proceedings had pursuant thereto in the District Court of Douglas County, Nebraska, in the suit entitled "The Department of Trade and Commerce of the State of Nebraska, plaintiff, vs. The Lion Bonding & Surety Company, a Corporation, defendant," the said Department of Trade and Commerce, on April 12, 1921, became vested with possession of all the property, records, and effects of said bonding and surety company, and with full and exclusive authority to conduct its business; and said corporation was forbidden by injunction from the transaction of its business or disposition of its property, records and effects, in proceedings which contemplated ultimate liquidation, and the vesting in said Department of Trade and Commerce of title to all the property, effects, contracts and rights of action of such company. So that by said public acts and judicial proceedings the said Department of Trade and Commerce became and was the statutory successor of said corporation, and all of its powers, rights and effects, with power and standing as such statutory successor, owner and proprietor to assert, hold and maintain the same in all of the states and federal judicial districts, the source of its powers and title in respect to said corporate property and business being the said public act or acts,

and its said title and powers not being derived from nor limited to such as flow from the mere appointment of an agency of the said court. The said proceedings of this honorable court, had without notice to or service upon said Department of Trade and Commerce, were therefore void for want of a necessary party, were a usurpation of the powers and functions devolving upon said department and agency of the State of Nebraska by said public act or acts, over the affairs and property of a domestic corporation of said state, and were an interference with and invasion of the exclusive jurisdiction of said District Court of Douglas County, Nebraska, which had previously vested, over the affairs and property of said domestic corporation, all of which were and are entitled to full faith and credit in the state and district of Minnesota, as is provided in and by the aforesaid provision of the Constitution of the United States.

VII. The court was and is without jurisdiction of the subject matter of the bill of complaint, or to appoint receivers, or administer and wind up the affairs and distribute the assets of the appellant, the particular facts which exclude such jurisdiction appearing on the face of the bill, and by the evidence adduced in support of defendant's motion to discharge the receivers, as follows: (1) The sum or amount in dispute was and is limited to Two Thousand One Hundred (\$2,100.00) Dollars and does not exceed, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars; (2) the plaintiff sues as a simple contract creditor on a claim not reduced to judgment without having previously exhausted or invoked his remedy at law, and without having or claiming any specific legal or equitable interest in or title to the property of defendant or any part thereof, and without alleging any jurisdictional ground for invoking the powers of equity; (3) defendant is an insurance company organized under and pursuant to the laws of Nebraska, and the courts of said state or the federal courts of the domiciliary judicial district have exclusive authority to entertain primary proceedings for a general receivership of said corporation, the closing and winding up of its affairs, the distribution of its assets or its dissolution, the suit for that purpose being local in its nature and not cognizable by the District Court of the United States for the District of Minne-



sota; and (4) prior jurisdiction over the subject matter of the administration, liquidation and dissolution of said defendant corporation, had vested in and was exercised by the District Court of Douglas County, Nebraska, in judicial proceedings had pursuant to the public acts of the said state, whereby the said corporation had been enjoined from transaction of its business or disposition of its property, records and effects, and possession had been decreed and taken by the Department of Trade and Commerce of the State of Nebraska of the property, records and effects of said corporation, with full and exclusive power to conduct its business, all in contemplation of the ultimate liquidation and dissolution of said corporation in the same proceedings. The jurisdiction so exercised by said court was and is exclusive and operated to withdraw the property, records and effects of said corporation from the control and jurisdiction of all other courts, including the United States District Court for the District of Minnesota.

**Proceedings in Case No. 467, in the United States District Court for the District of Nebraska, and on Appeal.**

This suit was brought by the receivers, while the appeal from the interlocutory order of the federal court for the District of Minnesota was pending and undetermined. That appeal from an interlocutory order was without a supersedeas, and did not arrest the functions of the receiver. The home office of the insurance company was at Omaha, and practically all of the assets had been seized and were held by the Department of Trade and Commerce of Nebraska, under the prior proceedings of the state court. The department, so in possession from a date twenty days anterior to the filing of the *Karatz bill*, was not made a party thereto. These circumstances rendered the receivership in the Minnesota District ineffective, except by ousting the state court and the State Insurance Department from their prior possession and control of the home office records and assets at Omaha, Nebraska. And this predicament was

the occasion for the suit in the Nebraska Federal District, a statement of which follows:

September 6, 1921, the Minnesota Receivers, *Hertz and Levin*, filed a bill in equity in the United States District Court for the District of Nebraska, in which they impleaded as defendants the Department of Trade and Commerce of the State of Nebraska, J. E. Hart, the Secretary, W. B. Young, Chief of the Department Bureau of Insurance, and Amos Thomas, special agent of the department in charge of the Lion Bonding & Surety Company, along with the corporation and its officers and directors.

The bill alleged the official character of plaintiffs and defendants; the proceedings had under the *Karatz bill* filed in the District of Minnesota, copies whereof were annexed; the proceedings had in the State District Court of Douglas County, Nebraska, and prior possession thereunder of the Department of Trade and Commerce, and the resulting conflict of judicial authority; an application by the insurance company under section 56 of the Judicial Code to the Circuit Court of Appeals for disapproval of exercise by the Minnesota Receivers of extraterritorial powers, and a denial thereof, subject to the qualification that the powers of the receivers should be subject to such rights of possession in the Department of Trade and Commerce of Nebraska, under proceedings in the State Court of Nebraska as had accrued when the rights of the receivers arose; that the state court on May 28, 1921, had entered an order directing the liquidation of the defendant insurance company and the Department of Trade and Commerce threatens to execute this order; that there is a conflict between the receivers and the State Department, and a conflict of authority between the District Court of the United States for the District of Minnesota and the District Court of the State of

Nebraska in and for Douglas County concerning such right of administration; and that the sole right of possession of the State Department of Trade and Commerce which had accrued to it under the order of the State Court "was the right and authority granted by the order of that court made on April 12, 1921, hereinbefore set forth, to the temporary possession of the property of the defendant corporation for the conduct of its business in accordance with said order, with the right to list and inventory the said property." (Printed Record, Case No. 467, pp. 2-9.)

The relief prayed included: Adjudication of the prior and exclusive right of the Minnesota receivers to administer its property and liquidate the affairs of the defendant insurance company, "and that the defendants have no right to the possession or control either for the administration of the affairs of defendant corporation, under the direction of the Nebraska Court, or otherwise"; an injunction restraining interference with the right of the Minnesota receivers to possession, control and disposition of the assets, books and records of defendant corporation, and that defendants be decreed to surrender the same to complainants as receivers, and for general relief.

The following specific averments of the bill will show that the points maintained by the petitioners arise on its face, and were properly presented by the motion to dismiss the bill:

"The Lion Bonding and Surety Company is a corporation organized and existing under and by virtue of the laws of nebraska \* \* \*; that the defendant W. B. Young, was and is chief of the Bureau of Insurance of the State of Nebraska \* \* \*; that the defendant, Amos Thomas, at all the times and dates mentioned in this bill \* \* \* was and is agent and representative of the defendant, the

Department of Trade and Commerce, of the State of Nebraska, and was and is in the immediate custody and direction of the property of said Lion Bonding and Surety Company under the direction of said department" etc. (Paragraph 1, Printed Record, pp. 2-3.)

"That the assets of the defendant corporation owned and possessed by it \* \* \* *situated in the State of Nebraska* \* \* \* consists of cash, mortgages and other securities, bills receivable, real estate, stocks and bonds of the total amount of approximately \$1,858,008.55." (Paragraph 2, Printed Record, p. 4.)

"That *before the appointment of these complainants* as receivers of the property and assets of the defendant corporation, the defendant, the Department of Trade and Commerce of Nebraska, had duly filed and presented to the District Court of the State of Nebraska in and for Douglas County in said State its verified petition, a true copy of which is hereto annexed," etc.

"That upon the filing and exhibiting of said petition the defendant corporation filed its answer thereto, a true copy of which is hereto annexed \* \* \*; that thereupon the said Nebraska Court made and entered its order directing the defendant Department to take possession of the assets and property of said defendant corporation for the purpose of administering, conducting and carrying on the business of the company, a true copy of which order is hereto annexed," etc.

"That *pursuant to said order* the defendant Department did take into its possession the books of the defendant corporation, its cash on hand, securities, etc., and said Department thereupon appointed and designated the defendant Thomas as its agent and representative to act for it in the supervision, control and management of the business of said corporation, and he entered upon the trust so imposed in it and said defendants, and said Thomas, with the aid and assistance of the other defendants herein, who are the officers of the defendant corporation, \* \* \* and under the direction and control of the defendant *Hart, as the managing officer of said Department*, have, notwithstanding

the appointment of your receivers, wrongfully and unlawfully, *assumed to continue* in the control, management and direction of the business of said defendant corporation and its properties, to the exclusion of these complainants as the receivers of said corporation."

"On or about the 15th day of May, 1921, the defendant corporation, under the provisions of Section 56 of the Judicial Code duly presented to the United States Circuit Court of Appeals for the Eighth Circuit an application for disapproval by said Court of the Order appointing receivers herein as aforesaid in so far as said order of appointment had extraterritorial effect by virtue of the filing of certified copies of said order, as hereinabove set forth, and therein set forth the facts and circumstances relating to the possession by said defendant Department and said Thomas of the property and assets of said defendant corporation \* \* \*. And on May 31, 1921, the said court made and filed its order denying said application with the qualification: Provided, however, that the right of said receivers to the possession of such property of said Company as is situated in the District of Nebraska shall be subject to such right of possession thereof in the Department of Trade and Commerce of Nebraska as had accrued to it under proceedings in the District Court of Douglas County in that state, when the right of the receivers arose under the laws of the United States; but nothing herein contained shall be construed as preventing the receivers appointed by the District Court of the United States for the District of Minnesota from applying to the District Court of Douglas County, Nebraska, at any time for the delivery to them of the property of said Company in that State.'" (The words of the order are copied from Exhibit 4 annexed to bill, the quotation therefrom in paragraph 3 of the bill not being accurate.)

"While the said petition so filed by defendant corporation in the Circuit Court of Appeals was still pending, and on May 28, 1921, the defendant Department filed in the District Court of the State of Nebraska in and for the county of Douglas its further petition praying for an order authorizing the winding up and liquidation of the business

of the corporation under its direction and that the agent and special employees theretofore engaged by said department to conduct the business of the corporation be continued in such employment for the purpose of liquidation, a true copy of which petition is hereto annexed," etc.

"That contemporaneously with the filing of said petition the defendant corporation \* \* \* filed in said Court its answer to said petition, a copy of which is hereto annexed \* \* \*; and thereupon, the same day said Nebraska Court made and entered its order in said proceedings a copy of which is hereto annexed," etc. (Paragraph 3 of bill, Printed Record, pp. 4-8.)

The order so referred to is found in Exhibit 8 annexed to the bill (p. 22) and directs liquidation of the company's business and distribution of its assets, under directions of the State Court.

The constitutional validity of the State regulatory statutes governing insurance companies and the business of insurance, under which the proceedings of the state court were had, and the jurisdiction of the State Court over the entire subject of dealing with delinquent and insolvent state insurance companies, including liquidation and distribution of assets, were not challenged by the bill. In effect, the bill affirms the validity of the state statutes, and the jurisdiction of the state court over the subject matter and parties.

The Department of Trade and Commerce, its secretary, Hart, the Chief of its Bureau of Insurance, Young, and its Special Agent, Thomas, moved on identical grounds to dismiss the bill, as not stating sufficient facts to constitute a valid cause of action in equity, nor to vest the Court with jurisdiction over the subject matter of the suit. The motions assigned the following grounds:

"1. It appears on the face of the bill filed herein by complainants, and of the documents and exhibits annexed



thereto and made a part of said bill, that under and pursuant to an order and judgment of the District Court of Douglas County, Nebraska, made and entered on the 12th day of April, 1921, the said Department of Trade and Commerce took possession, control, operation and administration of the offices, records, books, properties, assets and choses in action of the defendant, the Lion Bonding & Surety Company, for the purposes of operating and conducting said insurance company and conserving its assets in the interest of the public, the creditors and stockholders of said company in special proceedings therefor provided by Chapter 190, Laws of Nebraska, 1919, and that said Department now is and has been continuously since said April 12, 1921, in discharge of its duties pursuant to said appointment made in due and regular judicial proceedings by the said District Court of Douglas County, and has, pursuant to said order and with the approval of said District Court, placed its special agent, the defendant, Amos Thomas in charge of said company, its properties and assets within the territorial jurisdiction of the said state court.

2. In and by the said judicial proceedings had in the District Court of Douglas County, Nebraska, pursuant to the authority conferred upon said court under Chapter 190, Laws of Nebraska of 1919, the said state court by and through these defendants, its appointees with all of the powers of a receiver conferred by statute on said 12th day of April, 1921, took exclusive jurisdiction, control and custody of all of the property of said Lion Bonding & Surety Company as appears fully and at large on the face of complainants' bill and the documents and exhibits annexed thereto and made a part thereof and thereby withdrew the said property and all thereof within the territorial jurisdiction of said court from the jurisdiction and control of all other courts including the District Court of the United States for the District of Nebraska and the District Court of the United States for the District of Minnesota, Fourth Division, and under the rules of comity subsisting between the courts of the State of Nebraska and the Courts of the United States, the mutual recognition of which is necessary to avoid unseemly conflicts of authority, the priority and exclusiveness of the jurisdiction and control of said prop-

erty, the subject of this action, so taken and exercised by said state court should be accepted and recognized by this honorable court, and by virtue of said rule, the said United States District Court for the District of Nebraska is without any jurisdiction or authority to assume or take jurisdiction or control through receivers by injunction or otherwise, of any of the property of said Lion Bonding & Surety Company within the State of Nebraska or the territorial jurisdiction of the District Court of Douglas County, in said state.

3. It appears on the face of the bill of complaint of the complainants filed herein and the documents and exhibits annexed thereto and made a part thereof that the defendant corporation, the Lion Bonding & Surety Company was created and organized under the laws of the State of Nebraska and that it conducted and administered all its financial and pecuniary affairs at its principal office in the city of Omaha, Douglas County, Nebraska, all subject to the statutory regulations provided for by Chapter 190, Laws of Nebraska of 1919, including all of the provisions thereof for possession, operation, liquidation, distribution of its assets and dissolution by the Department of Trade and Commerce of said state upon the orders, directions and judgments of the appropriate district court of said state. Wherefore defendant suggests and submits to this court that any suit for the closing up of said corporation and distribution of all of its assets is of a local nature within the purview of the judicial code of the United States in which primary jurisdiction is vested solely and exclusively in the courts of the domicile of the said corporation and that on the face of complainants' said bill of complaint, the proceedings therein mentioned for the appointment of complainants as receivers in the said District Court of the United States for the District of Minnesota, Fourth Division, is the pretended exercise of primary jurisdiction to close the business and distribute the property and assets through general receivers of a corporation brought into existence by the laws of the sovereign State of Nebraska and whose continuance in business, dissolution or winding or closing up is vested exclusively in the domiciliary courts and is not competent to be exercised by a foreign court, and there-

fore the said United States District Court for the District of Minnesota was without jurisdiction of the subject matter of said action and could not for the purpose stated, acquire jurisdiction of said corporation and its properties within the state and district of Minnesota.

4. It appears on the face of the bill of complainants filed herein and of the documents and exhibits thereto annexed and made a part thereof that the only pecuniary interest of the plaintiffs in the controversy as presented by the said bill of complaint of A. H. Karatz in the United States District Court for the District of Minnesota was the sum of \$2,100.00 alleged to be payable on the draft of that sum as set forth in Paragraph 3 of the complaint of said Karatz and that the whole amount in controversy in said original suit in the United States District Court for the District of Minnesota is limited to the said principal sum of \$2,100.00 and does not equal or exceed the sum of \$3,000.00 exclusive of interest and costs and that the said original suit wherein the complainants herein were appointed receivers was not within the cognizance of a district court of the United States because the sum in controversy did not equal \$3,000.00 exclusive of interest and costs.

"5. It appears on the face of the bill of complaint of the complainants filed herein and of the documents and exhibits annexed thereto and made a part hereof that the bill of A. H. Karatz mentioned therein in his suit against the Lion Bonding & Surety Company filed with and exhibited to the said United States District Court for the District of Minnesota, Fourth Division, was founded on a simple contract on a claim not reduced to judgment and that the complainant in said suit, A. H. Karatz, had not invoked or exhausted his remedy at law and that in and by his said bill he asserted no specific lien nor any specific lien, legal or otherwise, in the property of the Lion Bonding & Surety Company and that the said Karatz did not by his said bill so exhibited in the United States District Court for the District of Minnesota, set forth or allege any jurisdictional averments entitling him to invoke the powers of a court of chancery such as are required by the rules and practice of the equity courts of the United States to give him standing

or entitle him to prosecute a suit in equity for any exclusive equitable relief or for the appointment of a receiver or receivers or for the administration of the property of the Lion Bonding & Surety Company and that therefore the said United States District Court for the District of Minnesota, Fourth Division, as a court of equity, was without jurisdiction of the subject matter presented by the bill of said A. H. Karatz and was without power to appoint a receiver for or otherwise administer the property and effects of the Lion Bonding & Surety Company.

The District Court denied a temporary injunction, sustained the motion, and summarily dismissed the bill of the Minnesota receivers. (Printed Record, Case No. 467, p. 43.)

On an appeal by the receivers from this final order, the Circuit Court of Appeals resolved the contested points in favor of the receivers, reversed the decree of dismissal, reinstated the bill, and directed the lower court to issue an injunction restraining the State Department and its officers from exercising any functions except to hold the custody of the property and records of or derived from the Lion Bonding & Surety Company "subject to the further order of the United States District Court for the District of Minnesota, Fourth Division."

It will be observed that in the earlier stages of the conflict of jurisdiction none of the federal courts whose powers were invoked asserted power to arrest the exercise by the state court of its unchallenged jurisdiction of the property located in Nebraska. Judge Booth, in the District of Minnesota, expressly stated "the receivers will not be instructed to take any steps to interfere with the possession by the State Court of Nebraska of the property within its jurisdiction." It was his opinion that the two administrations could proceed concurrently, the property in Nebraska being left

in charge of the Nebraska court which first seized it, and the property in other states being administered by the federal court. "It seems to me it would be perfectly possible for both courts to proceed with administering the assets under the control of each." (Opinion of Judge Booth, Printed Record, Bonding Co. v. Karatz, pp. 105-106.) The next expression in point of time, was that of the Circuit Court of Appeals in the order heretofore quoted that the rights of the Minnesota Receivers were subject to the right of possession of the Department of Trade and Commerce of Nebraska under proceedings of the District Court of Douglas County, Nebraska. The next expression was the summary dismissal, on motion, in the United States District Court of Nebraska, of the bill of the receivers.

## II.

### Assignment of Errors.

In the present review on writs of certiorari, on records not embracing assignments of errors in the proceedings of the Circuit Court of Appeals, petitioners present the following assignment of errors:

#### No. 574. Lion Bonding & Surety Co. v. Karatz

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree of the United States District Court for the District of Minnesota in A. H. Karatz against Lion Bonding & Surety Company.

2. Said court erred in affirming the order of said United States District Court denying the motion of the Lion Bonding & Surety Company, to discharge the receivers for said company.

3. Said court erred in affirming the order of said United States District Court denying the motion of the Lion Bonding & Surety Company to dismiss the bill of A. H. Karatz.

4. Said court erred in adjudging and holding that the District Court of Douglas County, Nebraska, in the suit of the Department of Trade and Commerce of the State of Nebraska against the Lion Bonding & Surety Company, was without power and jurisdiction over the entire subject matter of dealing with the business and property of said company, as a delinquent and insolvent insurance company, including its liquidation, the winding up of its affairs, its dissolution, and the final and complete administration and distribution of its assets.

5. Said court erred in that its said decree affirming the judgment of said United States District Court denied full faith and credit to the statutes of Nebraska governing and regulating the business of insurance and insurance companies, organized under the laws of said state, and to the judicial proceedings had pursuant to said statutes in the State District Court of Douglas County, Nebraska, in the suit of the Department of Trade and Commerce of the State of Nebraska against the Lion Bonding & Surety Company, and in that behalf its proceedings are violative of Section 1, Article 4 of the Constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and Congress may by general laws prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof," and of the Acts of Congress enacted pursuant thereto requiring full faith and credit to be accorded to such acts, records and judicial proceedings in the courts of the United States.



6. The said court erred in holding that the subject matter of winding up and closing the affairs of the Lion Bonding & Surety Company was not an action of a local nature, within the meaning and purview of the statutes of Nebraska of which the State District Court of Douglas County had previously taken exclusive cognizance, and in holding, in that behalf, that the exclusive authority of the state court of prior jurisdiction, is limited by the stage to which its proceeding had progressed, and not by the entire scope of its jurisdiction over the whole subject matter.

7. The said court erred in determining and holding that the power resides in the District Court of the United States for the District of Minnesota to supervise, in any manner, the prior proceedings pending in the District Court of Douglas County, Nebraska, or to determine, in a collateral proceeding, the limitation of said state court's jurisdiction in a pending suit of which it had admitted jurisdiction for some purpose.

8. The said court erred in holding that the corporate property of the Lion Bonding & Surety Company described in the bill was fixed property lying within different states, and that the receivers were vested with jurisdiction and control of said corporate property situate without the State and District of Minnesota.

**No. 467. Department of Trade and Commerce v. Hertz.**

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the decree of the United States District Court for the District of Nebraska summarily dismissing the bill of the Minnesota Receivers, in the suit of Hertz and others against Lion Bonding & Surety Company, Department of Trade and Commerce and others.

2. The said court erred in directing the lower court to issue an injunction in favor of said Hertz and Levin, as receivers, and against the Department of Trade and Commerce and others restraining them from disposing of the property, records, etc., of or derived from the Lion Bonding & Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota.

3. The said court erred in that the said order of injunction was directed against the Department of Trade and Commerce of the State of Nebraska, its officers and agent, who were acting for and under the orders of the State District Court of Douglas County, Nebraska, whose possession of the property affected was the possession of said state court, and said injunction operated to stay the proceedings in said state court, in violation of section 265 of the Federal Judicial Code providing that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

4. Said court erred in directing the lower court to reinstate the bill of the Minnesota receivers, because the suit is against one of the United States prosecuted by citizens of another state, over which the judicial power of the United States does not extend; the Department of Trade and Commerce of the State of Nebraska, J. E. Hart, Secretary of said Department, W. B. Young, Chief of the Bureau of Insurance of said Department, and Amos Thomas, Special Agent of said Department in charge of the Lion Bonding & Surety Company against whom said bill was brought, were in actual custody and control of the property sought by said bill to

be recovered, were duly appointed officers and agencies of the State of Nebraska, and constituted an executive and administrative Department of the government of said state, and were in performance of governmental functions, executing police regulations concerning insurance and insurance companies, under state statutes, the validity of which are not challenged by said bill, and said suit is against the State of Nebraska, within the meaning and purview of the eleventh amendment to the Constitution of the United States, which provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

5. The said court erred in that its said decree of reversal and reinstatement of said bill and its said directions to the lower court denied extraterritorial recognition and full faith and credit to the public acts of the State of Nebraska governing and regulating insurance companies and the business of insurance, and to the judicial proceedings of said state had pursuant to said public acts in the District Court of Douglas County, Nebraska, in the suit of the Department of Trade and Commerce of the State of Nebraska against the Lion Bonding & Surety Company, and in that behalf its said proceedings and decree are violative of section 1, article 4 of the Constitution of the United States, and the Act of Congress enacted pursuant thereto requiring full faith and credit to be accorded to such public acts and judicial proceedings in the courts of the United States, and in all of the States.

6. The said court erred in holding that the subject matter of winding up and closing the affairs of the Lion Bonding & Surety Company was not an action of a local nature,

within the meaning and purview of the laws of Nebraska of which the State District Court of Douglas County in said state had taken exclusive cognizance, and in holding, in that behalf, that the exclusive authority of the state court of prior jurisdiction is limited by the stage to which the proceeding had progressed, and not by the whole scope of its jurisdiction over the entire subject matter.

7. The said court erred in determining, in a collateral proceeding, the extent and limitations of the powers of the state court in a pending suit, of which said state court had admitted jurisdiction for some purposes.

8. The said court erred in resolving the issue concerning the jurisdiction of the District Court of Douglas County, Nebraska, to liquidate and administer the affairs and assets of the Lion Bonding & Surety Company against such jurisdiction, upon a consideration only of the allegations and prayer of the petition of the Department of Trade and Commerce on which said suit was initiated. Said consideration does reach or involve the extent of the state court's jurisdiction, under the established practice in the State of Nebraska, or in the courts of the United States.

9. The said court erred in its said proceedings and decree, in that its said decree, on the face of the record, violates a settled and established rule of jurisprudence that "when a court of competent jurisdiction has by appropriate proceedings taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

10. The said court erred in holding that the receivers, Hertz and Levin, were vested with jurisdiction and control of the property of the Lion Bonding & Surety Company outside of the State of Minnesota, the District of their ap-

pointment, the properties of said company described in the bill of A. H. Karatz, not being lands or properties of a fixed character lying within different states, as is required by section 56 of the Judicial Code of the United States, as a condition precedent to the vesting in receivers of any extra-territorial jurisdiction and authority whatever.

### III.

The Minnesota Receivers are not by the terms of section 56 of the Judicial Code vested with jurisdiction, and control of the Company's property in other districts, because the properties described in the bills do not consist of land or other property of a fixed character lying within different states.

The items of securities, and other personal items, comprising substantially the Company's assets, have their situs at the Home Office in Nebraska, and are subject to control of local tribunals only, whether state or federal. There is no authorization by statute or any general rule of jurisprudence, for the transportation of property of that class to a foreign jurisdiction for the purposes of administration and liquidation.

The jurisdictional condition precedent to the exercise by a federal receiver of any extraterritorial functions is stated in section 56 of the Federal Judicial Code as follows:

"Where in any suit in which a receiver is appointed *the land or other property of a fixed character*, the subject of the suit, *lies* within different states in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit," subject to further stated conditions.

In the subject of the Karatz suit in the Minnesota District "*land or other property of a fixed character*" lying

"within different states in the same judicial circuit"? Has the lower court rightly read and rendered the quoted clause which lays down the jurisdictional condition precedent on which the receiver's right to exercise any extraterritorial power depends?

In the edition of the Judicial Code prepared under direction of the Senate Judiciary Committee, printed pursuant to a Senate Concurrent Resolution, the following annotation appears under section 56:

"The purpose of the legislation was thus stated by Mr. Moon of Pennsylvania:

"It applies only to the appointment of a receiver to take physical possession of property lying in a territory covering more than one district. In other words, it is to cure the only objection that I have ever heard urged against the elimination of the circuit courts. It applies to a case where a receiver is to be appointed by a district judge covering property that *runs across* an entire circuit and includes a great number of districts, and it provides that the action of the district judge sitting in one circumscribed district shall be conclusive in the appointment of a receiver only to preserve the status quo, and that shall be subject to confirmation of the circuit court of appeals or a circuit judge within thirty days."

It is significant that the new provisions contained in section 56 of the Judicial Code are placed next following the section that contains the venue provisions for actions of a local nature, as follows:

Sec. 55. "Any suit of a local nature, at law or in equity, where *the land or other subject matter of a fixed character lies partly in one district and partly in another* within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed as fully as if the said sub-



ject matter were wholly within the district for which such court is constituted."

The purpose of section 56 was a qualified extension of the preceding venue provision to the identical class of property lying in different states of the same circuit, in cases in which receivers were appointed, subject to the requirement that the order appointing receivers and all orders affecting the property be entered of record in each district in which *any portion of the property may lie or be*. The conditions on which extraterritorial powers attach are expressed in the terms *lands* or *property of a fixed character* which *lie* within different states—the same terms that are employed in the preceding section. It is obvious that Congress had in contemplation, and used those terms to describe, property that constitutes an indivisible unit, and lies partly in one state and partly in another state. It is in such cases that *territorial* jurisdiction over part of a single subject, draws to the court control of that part which lies without the territorial boundaries of the district. The provision is analagous to that governing venue, and to provisions quite common in the states, that where land, the subject of the action, consists of one entire tract, situate in two or more counties, the action concerning it may be brought in any one of the counties in which any part thereof is situated. Certainly the terms employed in section 56 are intended to furnish a standard by which lands or *property of a fixed character*, to which it applies, may be differentiated from all other classes of property, to which, manifestly, the section is not intended to apply.

The word "*fixed*," as ordinarily used, and as defined primarily by the dictionary, means *securely placed, or fastened; settled, immovable, unalterable*. Per C.C.A., 8th Cir., in *National Candy Co. v. Miller*, 160 Fed. 56.

The same court, by Trieber, D.J., the author of the opinions below in the present cases, in *Kansas Gas & E. Co. v. Wichita Natural Gas Co.*, 266 Fed. 617, said of section 55 of the Judicial Code:

"The section only applies if the action involves property of a fixed character which lies partly in one district and partly in another district; the action may be maintained in either district where some of the property is situated."

In *Primas Chemical Co. v. Fulton Steel Corporation*, 254 Fed. 454, 469, the United States District Court for the Northern District of New York held that the existence of a bank account and offices of a corporation in the Southern District of the same state, was not sufficient, under Section 55 of the Judicial Code, to vest jurisdiction in the District Court for the Southern District to appoint receivers of the corporate property lying wholly in the Northern District of the same state. The court said:

"A bank account or a lease of two or three rooms for subsidiary office purposes does not constitute a subject-matter of a *fixed character*, within the meaning of Section 55, Judicial Code."

The situation in the case last cited seems quite similar to the present cases, and raises the same questions. The very extended territory and the great commercial and industrial interests comprised in the Eighth Judicial Circuit furnishes a striking illustration of the mischiefs that would flow from a disregard by the federal courts of the restrictive terms employed in Section 56 to define the class of property to which extraterritorial authority attaches. If the terms *property of a fixed character* be judicially disregarded or enlarged to include property of a movable and transient character, it would result that a policy holder of the St. Paul Fire & Marine Insurance Company, could by resort to a federal court have its home office, records, properties and effects transported for liquidation to Salt Lake City, Cheyenne,

Denver, Omaha, Kansas City, St. Louis, Little Rock, or any other remote point in the Circuit, in which a Court of the United States sits, if there be insurance premiums owing locally. Such a disregard of the principal of local administration is not sanctioned by any act of Congress, and such a practice is attended with a degree of distrust of the judiciary that is unwholesome.

Obviously one of the objects of abolishing the Circuit Courts, as courts of original jurisdiction, was to further the principle of local judicial administration, and it is consistent with that general purpose to provide for a single administration where property, the character of which requires it to be dealt with as a unit, lies partly in one state and partly in another. Every just consideration suggests the propriety of giving the restrictive words of Section 56 their natural and ordinary meaning and import.

If extraterritorial jurisdiction and control of defendant's properties by the receivers be tested by reference to the bill of Karatz on which their appointment is based, the sole averment concerning the nature of the property will be found in paragraph V of that bill, as follows:

"Your complainant further alleges that, although the defendant has its principal office or place of business in the city of Omaha, Nebraska, from which city all of the financial affairs of said company have been and now are being directed and administered, said defendant is the owner of and is possessed of a large amount of personal property within the District of Minnesota, consisting of premiums due from its policy-holders, money and credits in the hands of its local agents and in banks, and other property, the exact nature and character of which is to this complainant unknown, and which this complainant alleges to be of the value of at least Twenty Thousand Dollars (\$20,000.00).

The bill of the receivers against the Department of Trade and Commerce, on which the Circuit Court of Appeals

enforced their extraterritorial powers in the State of Nebraska by injunction contains the following averments:

"That the assets of the defendant corporation owned and possessed by it at the time these complainants were so appointed receivers, situated in the State of Nebraska, then and now, so far as these complainants have been able to ascertain, consists of cash, mortgages and other securities, bills receivable, real estate, stocks and bonds of the total amount of approximately \$1,858,008.55." (Printed Record, Case No. 467, p. 4.)

"These complainants further show that included in the assets of the defendant company is and was at the time of their appointment as receivers, a trust fund, consisting of bonds, mortgages and other securities, amounting in value upwards to two hundred thousand dollars, which was theretofore deposited by the Company with the Insurance Department of the State of Nebraska, as a guarantee fund to secure the payment of its obligations," etc. (Printed Record, Case No. 467, p. 7.)

These allegations concerning the property which is the subject of the suit, fall far short of an assertion that it consists of "land or other property of a fixed character," that "lies within different states in the same judicial circuit."

Obviously the statute does not contemplate segregated items of movable personal property, like bonds, mortgage notes and stocks. These and credit balances in depository banks, are not properties of a fixed character. They are movables, and do not lie, and are not alleged to lie "within different states." The extraordinary power of exercising control of property beyond the district of appointment is not vested in receivers over the class of property described in the bills in these cases.

The statute has in contemplation cases where the subject matter of the suit is regarded as "an integral, in-

divisible unit," such as land or other property of a fixed character that *lies within* different states. It includes lands, railroads telephone and telegraph lines, pipe lines and properties of a *fixed* character (as contradistinguished from movables) that lie within or run across different states, and which should be regarded and dealt with judicially as a unit. Authority to vest control of movable items of isolated securities, and the like, in courts sitting without the state of their situs, is not within the letter or intent of the statute. The statute was not intended to strike down the right of local administration or local government. These are inherent rights, in our system, and were not intended to be surrendered except where the subject matter was property of the class described, which should be administered as a unit, even though the whole property, considered as a unit, should "lie within different states."

On abolishing the Circuit Courts and conferring on the District Courts the powers which the Circuit Courts had previously exercised, it had been suggested that power to administer certain classes of properties of a fixed character, including lands or fixed properties lying within different states, which under the practice of the Circuit Courts had been dealt with as a unit, did not reside in the District Courts. It was to meet that objection, and to vest in the District Courts the powers, in that behalf, that were formerly exercised by the Circuit Courts, that the new provision, embodied in Section 56 was brought into the Judicial Code.

Territorial jurisdiction over some part of a single property unit is the statutory requisite of control by one court of a whole unit of property, lying partly in one district and partly in another. The very nature of the subject makes the indivisibility of the property, and its treatment as a

unit, a condition of the grant of extraterritoriality. In all other cases an ancillary suit by bill must be resorted to in other districts, as was formerly the practice of the Circuit Courts.

In *Farmers' Loan & Trust Co. v. Northern Pacific Railroad Company*, 69 Fed. 871, 882, the Court said:

"The railroad and real estate of the defendant, being *immovable*, could not be brought within the jurisdiction of that court. Neither could jurisdiction over the same be acquired by taking possession of such assets as money, bonds and other securities, or even railroad materials or supplies, or railroad cars while migrating over other lines. Custody of things *movable* and not indispensable to the operation of the railroad, will not draw jurisdiction in rem over a railroad situated beyond the jurisdiction, any more than it will bring the road itself within the boundaries of the jurisdiction."

The same case rests the rule permitting the court which first took jurisdiction of a part of a railroad to exercise control of those parts of the road in other districts, through ancillary proceedings, upon the necessity of dealing with the property as a unit.

In one of the Kansas Natural Gas cases the Circuit Court of Appeals for the Eighth Circuit in justifying an order of the federal court relinquishing control of property to Kansas State Court receivers, from the possession of its own receivers in the states of Missouri and Oklahoma said:

"Because of the nature of the natural gas business, the necessity of shifting the pipe lines and compressor plants to reach new sources of supply as gas pipes give out, the physical interconnection of the various pipe owned and leased, in fact that the principal source of supply is in



Oklahoma, while a large portion of the sales is in Missouri, and most of the trunk lines are in Kansas, all agree that the system operated by the Kansas Natural Gas Company *should be regarded as an integral individual unit.*" Per Hook, C. J., *Kansas City Pipe Line Co. v. Fidelity Title & Trust Co.*, 217 Fed. 191.

It seems clear, therefore, that the purpose of Section 56 of the Judicial Code is to vest power in the District Courts to deal with properties of a fixed character as a unit, notwithstanding they lie within different states, as had been previously done by the practice prevailing in the Circuit Courts. The restrictive terms employed in the opening sentence of the section, "Where \* \* \* lands or other property of a *fixed* character \* \* \* lies within different states" are appropriate to thus narrow its operation. The statute, obviously does not confer extraterritorial jurisdiction over all classes of property. Property of a fixed character, of such a nature that it may *lie* within different states, when it becomes the subject matter of a suit, and should be regarded and dealt with as a unit, is brought within the control of one court. The jurisdictional limitation of the District is still to be recognized, except as relaxed in dealing with a property of the class described as an indivisible unit, which lies partly in the District.

The notes, securities and stocks, records and effects of the Lion Bonding & Surety Company are movables, and negotiable, and have their situs (while possessed by the Company) at its home office in Omaha, Nebraska. These are not properties of a fixed character, lying or having their situs partly in one state and partly in another. There is no allegation in either bill that the property, the subject of the suit, is land or property of a fixed character *lying within* different states. There is here no averment of the jurisdictional condition precedent to the right of the re-

ceivers to exercise control of defendant's property without the District of their appointment—no averment that can draw to the Court in the Minnesota District control of property lying wholly in the State of Nebraska.

The conclusion is therefore unavoidable that filing of the order of appointment in other Districts within the Circuit was ineffective, and the Circuit Court of Appeals erred in directing the issuance of a writ of injunction to extend and maintain the territorial power of the District Court for the District of Minnesota, over the other Districts of the Eighth Judicial Circuit. To hold otherwise would strike down the right to local administration and local self-government in cases not contemplated by Congress and not within the letter or spirit or reason of Section 56 of the Judicial Code. The Insurance Company's assets consist mainly of personal items and have their situs at the Company's home office in Nebraska. The administration of the home office assets is tantamount to an administration of the all of the Company's assets, and there is no provision in the governing statute for divesting the authority of local tribunals and transporting the home office, assets, records and equipment into a foreign jurisdiction for the purposes of liquidation. That process is at war with right notions of local government, can not be sanctioned without specific legislative authorization, and such authorization is not written in the restrictive terms of Section 56.

A chancery receivership, except in the limited cases covered by Sections 55 and 56 of the Judicial Code, extends only to property within the district in which the suit is brought. This consideration, in itself, was a complete justification of the decree of the District Court for the District of Nebraska, summarily dismissing the bill of Hertz and Levin as receivers. The reversal of that decree by the

Circuit Court of Appeals was, therefore, erroneous, and it is submitted that, on the ground stated, the decree of the Circuit Court of Appeals should be reversed, and that of the United States District Court for the District of Nebraska, dismissing the bill, should be reinstated.

#### IV.

The state's power to regulate the business of insurance includes the power to provide by law for seizure of the assets of a delinquent and insolvent company of its own creation, vest its own administrative officers with legal title, liquidate its business and administer and distribute its assets, in a summary proceeding, in accordance with the principles of equity.

Such regulations and the state judicial proceedings had pursuant thereto must have extraterritorial recognition in all the states by the command of the full faith and credit clause of section 1, article 4 of the federal constitution.

The state liquidating officer, when vested with title to the corporate property, has standing as suitor in every state and federal judicial district, and is not bound by the territorial limitations that apply to ordinary chancery receivers.

The power to regulate the business of insurance is, by the Constitution of the United States, reserved to the states. That business, though conducted in a state by a foreign company, or a company created by another state, is not interstate or foreign commerce, and does not fall within any of the powers delegated to Congress by Section 8, Article 1, of the Constitution. *Paul v. Virginia*, 75 U. S. (8 Wall.) 168; *Hooper v. California*, 155 U. S. 648; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389; *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495.

Statutory regulation by the state of any business affected with a public interest, including summary proceed-

ings for liquidation in cases of delinquency or insolvency of those engaged therein, has had judicial sanction in America ever since the leading decision in 1838 by Chief Justice SHAW in *Commonwealth v. Farmers & Mechanics Bank*, 21 Pick. (Mass.) 542. And the summary liquidation of National Banks is an instance of the exercise by Congress of such power, that has the approval of the federal judiciary. *Bushnell v. Leland*, 164 U. S. 684.

The business of insurance is one of public interest subject to statutory police regulations by the states, even to the extent of fixing rates of premiums. *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389.

It is settled that the power of the states to regulate the business of insurance extends to the specific subject of providing a summary method of liquidating delinquent and insolvent domestic insurance companies and vesting in a state department or administrative agency, as a statutory liquidator, legal title to all assets, wherever situate. Under such regulations, the statutory liquidator has standing as a suitor in all of the states and federal judicial districts to assert his dominion as a proprietor over the corporate property, and is not bound by the limitations which apply to an ordinary chancery receiver. Extraterritorial recognition of such powers is commanded by the full faith and credit clause of Section 1, Article 4, of the federal constitution. *Relfe v. Rundle*, 103 U. S. 222; *Bernheimer v. Converse*, 206 U. S. 516; *Converse v. First National Bank*, 212 U. S. 567; *Converse v. Hamilton*, 224 U. S. 243; *Martyne v. American Union F. Ins. Co.* (N. Y.), 110 N. E. 502; *Bockover v. Life Association of America*, 77 Va. 85; *Kinsler v. Casualty Co.*, 103 Neb. 382.

In *Converse v. Hamilton*, 224 U. S. 243, Mr. Justice VAN DEVANTER traced the source of the doctrine to the full

faith and credit clause of the constitution, and held that the vesting of the right of action in a Minnesota receiver, as liquidator of an insolvent corporation, with the incidental right to extraterritorial recognition thereof in all states, was peculiarly within the regulatory jurisdiction of the state.

This court, it is submitted on the precedents cited, has definitely settled that it is within the jurisdiction and power of the State of Nebraska to regulate and govern insurance companies of its own creation, and by a state administrative agency to seize the corporate assets and vest such agency with the legal title thereto, liquidate the business and administer and distribute the assets in accordance with the principles of equity, in a summary proceeding; and that such regulations, and the judicial proceedings of the state for their enforcement, are entitled to extraterritorial recognition in all the states and federal judicial districts by the express command of the constitution. Under this doctrine the statutory liquidator, vested with title to the corporate assets by operation of a statute of the domiciliary state, carries with him into every state a proprietor's standing as a suitor, and is not subject to the territorial limitations applicable to ordinary chancery receivers.

Recognition of this established doctrine is found in the opinion of the Circuit Court of Appeals in the present cases, as follows:

"But when the statutes of the state under whose law the corporation is created vests the title to all property of the defendant in the receivers, assignee or state board, they are entitled to the possession wherever the property is situated. In *Relfe v. Rundle*, 103 U. S. 222, 226, it was held that, as the Insurance Commissioner of the State of Missouri was, by the laws of that state, vested with the title of all the property and assets of insolvent insurance corporations

created by that state, the Insurance Commissioner can maintain suits in the courts of any state and recover the property, although in possession of a receiver appointed by a court of a foreign state. In *Bernheimer v. Converse*, 206 U. S. 516, 534, and *Converse v. Hamilton*, 224 U. S. 243, 260, the same conclusions were reached under a statute of the State of Minnesota, vesting in a receiver of an insolvent corporation the absolute title to all its property, with power to sue in any court, including those of a foreign jurisdiction. And this rule of law is recognized in the Supreme Court of Nebraska. *Kinsler v. Casualty Co.*, 103 Neb. 382, 172 N. W. 22." (Printed Record, Case No. 467, p. 62.)

"Full faith and credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state. And the Congress may by general laws prescribe the manner and effect thereof." U. S. Const. Art. 4, Sec. 1.

It is not material at the present time to inquire whether the quoted words of the constitution, by their own inherent force, apply to and bind the courts of the United States. The concluding words of the full faith and credit clause delegate to Congress the power to prescribe "the effect thereof." Congress exercised this delegated power by the Act of May 26, 1790, in which it was declared:

"The records and judicial proceedings authenticated as aforesaid shall have such full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

The corresponding provision now in force is as follows:

"And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory or County, as aforesaid, from which they are taken." U. S. Rev. Stat., Sec. 906, U. S. Comp. Stat., 1916, Sec. 1520.



The uniform holdings of this court are that the quoted provisions is within the constitutional power of congress, that the words "every court within the United States," comprehend and include the federal courts, and, therefore, that the federal courts are bound by the full faith and credit clause of the constitution and the act of Congress cited, to the same extent as are the courts of the several states. *Mills v. Duryee*, 7 Cranch, 483 (opinion by Mr. Justice STORY); *Hampton v. McConnell*, 3 Wheat. 235 (Opinion by Chief Justice MARSHALL); *Pennington v. Gibson*, 16 How. 65; *Chever v. Wilson*, 9 Wall. 108, 123; *Atchison, T. & S. F. R. R. Co. v. Sowers*, 213 U. S. 55, 64.

We have given the references to maintain the doctrines above stated, for the convenience of the court, without argument, because they are regarded to be definitely established, and obviously applicable to the cases under review.

## V.

The system of state regulation of insurance companies, in force in Nebraska, is a valid exercise of the police power.

The bill of the receivers, filed in the Nebraska District, shows a prior order of liquidation by the state court which operated to vest in the Department of Trade and Commerce title to the corporate property. The extraterritorial rights, incident to such vesting of title, are paramount, and exclude exercise of judicial authority by other courts over the same property.

In the leading case of *Relfe v. Rundle*, 103 U. S. 222, it was held that a decree of a Missouri court dissolving an insolvent life insurance company of that state, when a local statute, in that contingency, vested its property in the state superintendent of insurance, gave the superintendent standing as a suitor in a sister state and entitled him to remove to the Circuit Court of the United States an action instituted

in a state court of Louisiana by citizens of that state *prior to the decree of dissolution by the Missouri Court*. Mr. Chief Justice WAITE in maintaining the standing of *Relfe*, Superintendent of Insurance, as a suitor in the foreign court, against an objection that he "had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana," said, pp. 225, 226:

"*Relfe* is not an officer of the Missouri State Court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the use and benefit of its creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs.

"We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and that a receiver, appointed by a State court has no extraterritorial power; but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily, it must act through agents, and the State which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of

all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No State need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

"By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the state, and he was charged with the duty of winding up its affairs. Every policyholder and creditor in Louisiana is charged with the notice of this charter right, which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs."

In *Bernheimer v. Converse*, 206 U. S. 516, the court held that "A chancery receiver of a domestic corporation upon whom as a quasi assignee and representative of creditors is conferred by Minnesota Gen. Laws 1899, Chapter 272, the authority to maintain an action to enforce the liability of stockholders, may sue in a foreign jurisdiction." The court said, page 534:

"It is objected that the receiver cannot bring this action and (citing various cases) are cited and relied upon, but in each and all of these cases it was held that a chancery re-

ceiver having no other authority than that which would arise from his appointment as such, cannot maintain an action in another jurisdiction. In this case, the statute confers the right upon the receiver as a quasi assignee and representative of creditors and as such, vested with the authority to maintain an action. In such case, we think the receiver may sue in a foreign jurisdiction."

In *Converse v. First National Bank*, 212 U. S. 567, where, in a similar action, the Supreme Court of Errors of Connecticut had given judgment against the receiver, the Supreme Court of the United States reversed the judgment on the authority of *Bernheimer v. Converse*, 206 U. S. 516.

*Converse v. Hamilton*, 224 U. S. 243, was a writ of error to the Supreme Court of Wisconsin to review a judgment denying the standing of a receiver of a Minnesota corporation appointed by a Minnesota court to maintain an action in the courts of Wisconsin to enforce liability of stockholders under laws of Minnesota which vested the cause of action in the receiver. The error relied on was denial of full faith and credit to the public acts and judicial proceedings of the State of Minnesota. In the opinion, Mr. Justice VAN DEVANTER, after stating the case, said, pp. 256, 257:

"This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that state, discloses, as we think, that in the cases now before us the supreme court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded. It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Hale v. Allison*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770. But here the receiver

was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his cestuis que trustent, a right of action, transitory in character, against one who was liable contractually and severally, if at all."

The opinion quotes, approvingly, *Bernheimer v. Converse*, 206 U. S. 516, and adds, 224 U. S. 260, 261:

"True, the full faith and credit clause of the Constitution is not without well-recognized exceptions, as it pointed out in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237, and *National Exch. Bank v. Wiley*, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70; but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. The subject to which chapter 272 is addressed is peculiarly within the regulatory power of the state of Minnesota; so much so that no other state properly can be said to have any public policy thereon."

The opinion concludes, page 261:

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and

credit to which they were entitled under the Constitution and laws of the United States."

The state courts have followed the rule of this court, announced in the cases above cited. *Bockover v. Life Association of America*, 77 Va., 85; *Kinsler v. Casualty Co.*, 103 Neb., 382; *Howorth v. Angle* (N. Y.) 56 N. E., 489; *Martyne v. American U. F. Ins. Co.* (N. Y.), 110 N. E., 502; *Howarth v. Lombard* (Mass.), 56 N. E., 888.

It is not material that the actual entry by the state court of the order of liquidation was not made prior to the appointment of receivers by the United States District Court for the District of Minnesota. It is enough that the state court had taken jurisdiction of the subject matter. In *O'Neill v. Welch* (C.C.A., 3 C.), 245 Fed. 261, the state courts proceeding had only reached the stage of a pending preliminary order to show cause why the Insurance Commissioner should not take charge of the corporate assets. The Pennsylvania statute, under which the state court was proceeding, vested title in the commissioner "as of the date so ordering him to liquidate." The order to liquidate was within the court's jurisdiction, but had not been entered. The situation was identical with that presented by the present records. The authority of the state court was held in that case to extend to the subject matter of liquidation and to exclude administrative powers of the federal court.

The Department having been in possession from a date twenty days prior to commencement of the receivership suit in Minnesota, and being lawfully in possession when the state court ordered liquidation, its control is paramount and exclusive. The legal title had vested in the Department by virtue of that order and had been so held from May 28 to September 6, when the receivers, by bill filed in the Ne-



braska District, sought control of the Nebraska assets, by the writ of injunction to stay proceedings in the State Court.

The argument of convenience has no bearing here. The extra-territorial rights of the Department of Trade and Commerce, as owners of the corporate assets, are of constitutional origin, and assure the most efficient and convenient mode of liquidation of a corporation, having a nation wide business, that has been devised. All need of ancillary chancery proceedings in aid of a primary administration seems to be eliminated, and this court will surely not indulge any presumption against the good faith of the administrative or judicial departments of the State, even though imputed by the bill.

From the numerous opinions of this court defining the controlling considerations, which, in ordinary cases, determine priority of jurisdiction when a conflict of judicial authority has arisen, we extract the following characteristic expressions:

"When a court of competent jurisdiction has by appropriate proceedings taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which seized it. \* \* \* These principles are of general application; they are not based on any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially, and with a spirit of respect for the just authority

of the states of the Union." (*Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54.)

"If a court of competent jurisdiction, federal or state, has taken possession of property, or, by its procedure, has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the other authority, as effectually as if the property had been entirely removed to the territory of another sovereignty." (*Palmer v. Texas*, 212 U. S. 118, 125.)

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." (*Farmers Loan & T. Co. v. Lake Street Elevated R. Co.*, 177 U. S. 51, 61.)

The long train of applications presented to this Court, in the exercise of its original jurisdiction, for writs of *habeas corpus* and *prohibition*, growing out of proceedings like those here challenged, justifies this Court's characterization of the conflicts resulting therefrom as "unseemly and subversive of justice." Such is their unavoidable tendency.

At least fourteen states, including the great industrial and commercial states of New York, Pennsylvania, Ohio, Missouri, Michigan and Wisconsin, have statutes regulating insurance that provide for liquidation of delinquent and insolvent companies by the state officer or department charged with administering the police regulations governing the business of insurance. In all of these states the judicial order directing liquidation operates to vest in the administrative officer or department of the state title to all of the company's property. The influence upon state legislation

and upon the administration by the states of delinquent and insolvent insurance companies of their own creation, of the approval by this court in *Relfe v. Rundle*, 103 U. S. 222, of the regulatory act of Missouri, is thus apparent. The holding in that case that the states have power, as sovereigns, to thus liquidate corporations of their own creation, was supposed to have eliminated all risks of failure of that legislative method of regulation and administration.

An examination of the state statutes in question shows such a striking similarity, even in some cases, to the detail of arrangement of the subdivisions of the sections, as to justify their being characterized as identical with the Nebraska statute here involved. Some variations are, of course, necessary to make the common regulations fit the varying forms of state administrations; and these are, for the most part, the only differentiations. The substantive provisions are practically identical as the following references will show:

"If \* \* \* the court shall order \* \* \* such liquidation shall be made by \* \* \* the Corporation Commission which may deal with the property, \* \* \* in the name of the Corporation Commission \* \* \* and the Corporation Commission shall be vested by the operation of law with title to all the property, \* \* \* as of the date of the order so directing it to liquidate." (Laws Arizona, 1913, Ch. 94, Sec. 1, Subd. 3; Rev. St. Arizona, 1913, Sec. 3385.)

"If \* \* \* the court shall order \* \* \* such liquidation shall be made by and under the direction of such insurance commissioner, and his successors in office, who may deal with the property \* \* \* in their own names as insurance commissioners \* \* \* and shall be vested by operation of law with title to all of the property \* \* \* as of the date of the order so directing them to liquidate." (Laws California, 1919, "an act to provide for proceedings against and liquidation of delinquent insurance corporations and associations." Approved Apr. 30, 1919, Sec. 4.)

"If, \* \* \* the court shall order \* \* \* such liquidation shall be made by \* \* \* the State Treasurer, who may deal with the property \* \* \* in his own name as State Treasurer \* \* \* and shall be vested by operation of law with title to all property \* \* \* as of the date of the order so directing him to liquidate." (Rev. Gen. Stats. Florida, 1920, Sec. 4271.)

"If \* \* \* the court shall order \* \* \* such liquidation shall be made by and under the direction of the commissioner, who may deal with the property \* \* \* in his own name as commissioner \* \* \* and the commissioner shall be vested by operation of law with title to all the property, contracts \* \* \* as of the date of the order so directing him to liquidate." (Park's Ann. Code Georgia, 1914, Vol. 2, Sec. 2442c.)

"\* \* \* Such liquidation shall be made by and under the direction of the Commissioner of Insurance \* \* \* as the court may direct and shall be vested by operation of law with title to all of the property \* \* \* as of the date of the order so directing him to liquidate." (Public Acts Michigan, 1917, Act. 256, Sec. 4.)

*"Title of Assets to Vest in Superintendent.*—Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policy holders of such company and such other persons as may be interested in such assets." (Revised Statutes Missouri 1909, Sec. 7085.)

"If, \* \* \* the court \* \* \* shall order the liquidation of the business of such corporation such liquidation shall be made by and under the direction of such Superintendent and his successors in office, who may deal with the property and business of such corporations in their own names as Superintendents \* \* \* and shall be vested by operation of law with title to all of the property, \* \* \* of such corporation as of the date of the order so directing them to liquidate." (Insurance Laws, New York, 1922, Sec. 63, Subd. 3.)

"If, \* \* \* the court shall order \* \* \* such liquidation shall be made by and under the direction of the Superintendent, who may deal with the property, \* \* \* in his own name as Superintendent \* \* \*, and shall be vested by operation of law with title to all of the property \* \* \* of the date of the order so directing him to liquidate." (Ohio Gen. Code, Sec. 634, Subd. 4.)

"If, \* \* \* the court shall order \* \* \*, such liquidation shall be made by \* \* \* the (Insurance) Commissioner, who may deal with the property \* \* \* in his own name as Commissioner, and he shall be vested by the operation of law with title to all the property \* \* \* of such company as of the date of the order so directing him to liquidate." (Laws Oregon, 1917, Ch. 203, pp. 345, 346.)

"\* \* \* liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property \* \* \* as of the date so ordering him to liquidate." (Public Laws Pennsylvania, 1911, p. 599, Sec. 3, quoted *in extenso* in *O'Neill v. Welch*, 245 Fed. 262.)

"Such liquidation shall be made by and under the direction of the Commissioner \* \* \* as the court may direct and shall be vested by operation of law with the title to all of the property, \* \* \* as of the date of the order so directing him to liquidate." (Code of Virginia 1919, Sec. 4244.)

"If \* \* \* the court shall order \* \* \*, such liquidation shall be made by \* \* \* the Commissioner, who may deal with the property \* \* \* in his own name as Commissioner \* \* \* and he shall be vested by the operation of law with title to all the property \* \* \* as of the date of the order so directing him to liquidate. (Washington Insurance Code, 1919, Ch. 49, Art. I, Sec. 11, Subd. 1.)

"If \* \* \* the court shall order \* \* \* such liquidation shall be made by \* \* \* the Commissioner, who \* \* \* shall be vested by operation of law with the title to all the property \* \* \* as of the date of the order so directing him to liquidate." (Wisconsin Insurance Laws, 1921, p. 199, Sec. 1970M, Subd. 3.)

The rule that jurisdiction in an administration suit in equity is an exclusive one, which withdraws the *res* from the jurisdiction of all other courts and resolves all conflicts of authority according to the priorities of the proceedings in which judicial cognizance is taken of the subject matter, is no longer rested on mere considerations of comity. This court has repeatedly stated that the rule rests on necessity and is a doctrine of right and of law. It is submitted that extraterritorial recognition of the prior judicial proceedings of a state is comprehended within the full faith and credit clause of Section 1, Article 4 of the Constitution, and the rule referred to may properly be rested on that foundation. The regulatory statute of Nebraska here involved does not infringe or usurp the sovereign powers of the United States or of any sister state. According to the cases cited the regulation of domestic insurance companies, including the incident of liquidation, is a subject well within the jurisdiction of the State of Nebraska, concerning which no other state can properly be said to have any public policy.

The regulatory statute is a part of the charter of the Lion Bonding & Surety Company, and follows the company into every state in which it does business. Creditors in sister states must take notice of these charter limitations, and impliedly assent, in event of insolvency, that the designated state agency succeed to the corporate property and conduct the liquidation proceeding.

A sovereign state is here as a suitor, by its appointed agency, seeking to maintain its police power, exercised by its legislative, administrative and judicial departments over the government, liquidation and dissolution of a corporation of its own creation, engaged in a business of public interest and concern. An established system of state regulation and liquidation of such companies is involved. The business in



question does not involve interstate or foreign commerce, and lies without the schedule of subjects over which control has been delegated to Congress by the National Constitution. It falls within the reserved powers of the states.

The state regulations have operated to further public interest; they have obviated unseemly conflicts of judicial authority; prevented adventurous raids upon the assets of insolvents; and raised the administration of insolvent companies above the scandals incident to the races for preferences and chancery receiverships in numerous jurisdictions, frequently incidents of failures of great financial institutions. The system at stake had the approval of this court in *Relfe v. Rundle*, and is operative, by statutory enactments, in at least fourteen states, including those of the greatest industrial and commercial importance.

The course of state administration has developed a commendable spirit of comity between the several state insurance departments. Examiners of the different states participate with those of the domiciliary state in examinations of complaints against delinquents. Uniformity of action in the public interest is thus attained, and local administration of insolvents is assured. The present records show that the examination of the Lion Bonding & Surety Company, which resulted in proceedings against it by the domiciliary department, and withdrawal of its licenses to do business in other states, was participated in by examiners from the departments of Nebraska, Iowa, Minnesota, Kansas and Idaho; and that the report of this joint examination was addressed to the Insurance Commissioner of Missouri, as well as to the Commissioners of the five states previously named. There is no conflict between the administrative departments of the states, each of which is conceded the right of liquidation of companies of its own state. Efficiency, economy and expedi-

tion of the administration of insolvent insurance companies are the aims of this scheme of state regulation. Its general adoption resulted from extended legislative investigations, the most notable of which was in New York.

It is submitted that such control by the state of insurance companies of its own creation, including liquidation, is both prudent and lawful; and that the state's police power over that subject cannot be stricken down by the federal judiciary, without stripping the state of one of its recognized attributes of sovereignty, overruling *Relfe v. Rundle*, and disregarding the full faith and credit clause of Section 1, Article 4, of the Constitution of the United States.

## VI.

The allegations and prayer of the petition of the Department of Trade and Commerce are not a test of the jurisdiction of the state court over the subject matter.

The records show that the state court had prior jurisdiction of the subject matter of dealing with the property and affairs of a delinquent and insolvent insurance company created by its sovereign; that in exercise of that jurisdiction it had, by a formal order, directed the Department of Trade and Commerce, the statutory appointee, to seize all of the Company's property, records, and effects; and, that such property, records and effects were actually seized and taken into custody by the Department, pursuant to the order of the State Court, and were so held throughout the proceedings had in the lower courts in the cases at bar.

That situation existed when the United States District Court for the District of Minnesota, on a bill subsequently filed by Karatz, a simple contract creditor, having a claim of only \$2,100.00, appointed receivers without notice to defendant, and undertook to conduct a hostile general ad-

ministration of the same insurance company, to close its business and distribute its assets.

As we read the pleadings and the opinions of the United States District Court and the Circuit Court of Appeals, it is conceded that the State Court had jurisdiction for some purposes and rightly seized the property, records and effects of the delinquent insurance company. We understand it to be conceded that the power did not reside in the United States District Court for the District of Minnesota to interfere with or oust the State Court of its prior possession and of the exercise of its prior jurisdiction over the property, records and effects of the delinquent Company until it had fully accomplished the purpose for which it had seized the property. The validity of the regulatory statutes of Nebraska, which conferred jurisdiction on the State Court over the subject matter and delegated to the Department of Trade and Commerce the functions of administration, under direction of the State Court, are not challenged by the pleadings nor by the opinions of the lower courts.

The narrow ground upon which the federal District Court is adjudged to have power to arrest, by the writ of injunction, the prior proceedings in the State Court, and to wrest from the appointees of that Court their prior possession of the Company's property, records and effects is this: That the State Court held the property for a temporary purpose only; and did not, *under the prayer* of the petition of the Department, on which the order of seizure was based, have jurisdiction to conduct an administration proceeding to close the business and dissolve the corporation, and administer, and distribute its assets; that the State Court could only hold the property till the stockholders should restore the company to a condition

of solvency, and until it should be ascertained, upon a hearing, that it could safely resume conduct of its business. That purpose had not been accomplished and the State Court had not restored the corporation to its properties nor settled with nor passed the accounts of the Department of Trade and Commerce. The sole incident on which the right of interference by the federal court is rested is an order of the state court directing the liquidation of the Company, upon a petition by the Department of Trade and Commerce, showing that the cause of the original order had not been removed, and that the public welfare would not admit of resumption of business by the corporation. That order of liquidation was adjudged by the Circuit Court of Appeals, as we understand the opinion, to be an abandonment of the original purpose of the proceeding in the State Court, and the initiation of an administration suit. The date of that order and not the commencement of the suit was adjudged to be the effective date of the beginning of the administration suit in the State Court for the purpose of determining the issue of priority as between the state and federal courts. The commencement of the State Court proceedings, when the property was seized, was April 12; the order of liquidation was May 28, and the Karatz suit was commenced in the Minnesota District May 2, between the dates of the seizure by the State Court and its order of liquidation. It was by disregarding the date of seizure, and by denying to the State Court the power to determine, in a pending case, the scope of its own jurisdiction, that the issue of priority was resolved in favor of the federal court. This embodies the most favorable and, indeed, the only admissible theory of the priority of the federal court proceedings, that is open on the face of the pleadings and record.

It is submitted that this theory, on which the judgment below is rested, is erroneous, for the following reasons:

## VII.

The state statutes conferred jurisdiction on the District Court of Douglas County of the entire subject matter of dealing with insolvent domestic insurance companies, including their liquidation and dissolution, in a single equitable proceeding, prosecuted by the Department of Trade and Commerce.

The federal courts have no power to correct supposed errors of the state court. A total want of jurisdiction is the only ground on which the prior proceedings of the state court can be ignored or disregarded by the courts of the United States.

That the state court had not proceeded beyond the stage of mere conservation of the corporate property, when the proceedings of the federal court intervened, is not material, because the state court, by a state statute, had jurisdiction of the entire subject matter of dealing with the property and affairs of the corporation, including liquidation and distribution, and was entitled to retain the case until it had exhausted its jurisdiction.

Obviously, the power to arrest the prior proceedings of the state court by injunction and to mandatorily divest its prior possession by a decretal order directed against the state court's appointees, or by the writ of injunction, does not reside in a District Court of the United States if the state court had prior jurisdiction of the whole subject matter.

### The Applicable State Laws

The Nebraska statutes, from which are derived the power of the state judiciary and the state administrative agencies appointed to execute the regulations governing the business of insurance, are embraced in Chapter 190, Nebraska Laws, 1919, known as the "Civil Administrative Code." (Comp. Stat. Neb., 1922, Secs. 7745-7748.) Title 5, Article III, of the act commits the administrative regulation

of insurance to the Department of Trade and Commerce and embraces the following provisions:

"Sec. 1. The Department of Trade and Commerce shall have general supervision, control and regulation of insurance companies associations and societies, and the business of insurance in Nebraska, including companies in the process of organization. It shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this enactment and all laws relating to the business of insurance, and to that end may authorize and empower an assistant or employee to do any and all things that it may do, and on its behalf, and it shall see that all laws respecting insurance companies are faithfully executed \* \* \*" (Laws Neb., 1919, p. 576; Comp. Stat. Neb., 1922, Sec. 7745.)

"Sec. 2. Whenever it appears to the department of trade and commerce from any proper showing made to it, or from any examination made, that the capital stock of any domestic insurance company is impaired, or that its assets are insufficient to justify its continuance in business, it shall at once determine the amount of such impairment or deficiency, and thereupon issue a written notice to the company requiring its stockholders to make good the amount of the impairment or deficiency with cash or investments authorized by this article, or to reduce its capital stock not below statutory requirements within ninety days from the service of the notice. If the amount of any such impairment or deficiency shall not be made good within the time specified in such notice, and proof thereof filed with the department of trade and commerce, the company shall be deemed insolvent and shall be proceeded against as an insolvent company in the manner authorized and directed by this article \* \* \*" (Laws Neb., 1919, pp. 577, 578; Comp. St. Neb., 1922, Sec. 7746.)

Section 3 applies to mutual companies and is not relevant to the instant case.

"Sec. 4. *Delinquent Companies—Proceedings—Liquidation.* (1) Whenever any domestic company is insolvent,



or has refused to submit its books, papers, accounts or affairs to the reasonable inspection and examination of the department of trade and commerce, or has neglected or refused to observe an order of the department of trade and commerce, to make good within the time prescribed by law, any deficiency, whenever the capital of a stock company, or the reserve of a mutual company, shall have become impaired, or it has by contract or re-insurance, or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge (merge) substantially its entire property or business in the property or business of any other company without first having obtained the written approval of the department of trade and commerce, or is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policyholders, or to its creditors, or to its stockholders, or to the public; or has wilfully violated its articles of incorporation or association or any law of this state, or whenever any trustee, director, manager or officer thereof has refused to be examined under oath touching its affairs, the department of trade and commerce may apply to the district court or any judge thereof, in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the department of trade and commerce should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders or the public may require." (Laws Neb. 1919, pp. 579-581.)

"(2) On such application, or at any time thereafter, such court or judge may, in his discretion, issue an order restraining such company from the transaction of its business, or disposition of its property, records and effects until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the department of trade and commerce forthwith to take possession of the property, records and effects, and conduct the business of such company, and retain such possession and conduct the

business of such company until on the application of the department of trade and commerce, or of such company, it shall, after a like hearing, appear to the court that the cause of such order directing the department of trade and commerce to take possession has been removed, and that the company can properly resume possession of its property, records and effects, and the conduct of the business."

"(3) If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the department of trade and commerce, which may deal with the property, records, effects and business of such company in the name of the department of trade and commerce or in the name of the company, as the court may direct, and it shall be vested by operation of law with title to all property, effects, contracts and rights of action of such company as of the date of the order so directing it to liquidate. The filing or recording of such order in the office of the register of deeds in any county where property is located in the state shall impart the same notice that a deed, bill of sale, or other evidence of title, duly filed or recorded by such company would have imparted.

"(4) For the purpose of this section, the department of trade and commerce shall have power to appoint one or more special employees as its assistant, or assistants, and to employ such counsel and clerks as may be deemed necessary to give each of such persons such powers to assist the department of trade and commerce as the department of trade and commerce may consider proper. The compensation of such assistants, counsel and clerks, and all expenses of taking possession of and conducting the business of liquidating any such company, shall be fixed by the department of trade and commerce, subject to the approval of the court, and shall on the certificate of the department of trade and commerce, be paid out of the funds or assets of such company.

"(5) For the purpose of this section the department of trade and commerce shall have power, subject to the ap-

proval of the court, to make and prescribe such rules and regulations as the department of trade and commerce may deem proper.

“(6) The department of trade and commerce shall transmit to the legislature, in its annual report, the names of the companies so taken possession of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policy holders, creditors, stockholders and the public with its proceedings under this section.

“(7) At any time after the court shall order the liquidation of the business of any such company, as provided in paragraph three of this section, the department of trade and commerce may apply for the dissolution of such company, and the same, after due notice and hearing, and such other procedure as the court shall deem proper, shall be dissolved.

“(8) This section shall also apply to any domestic company which is doing, has done, or is attempting to do, or representing that it is doing an insurance business in this state, or which is in process of organization intending, or representing that it is intending to do any such business herein.” (Laws Neb. 1919, pp. 579-581; Comp. St. Neb. 1922, Sec. 7748.)

Under authority of the foregoing statutes, the Department of Trade and Commerce proceeded by a suit in equity against the Lion Bonding & Surety Company in the State District Court of the county of its domicile, on April 12, 1921, by a petition or bill which alleged a previous investigation by one of its own examiners, participated in by examiners of the insurance departments of the states of Iowa, Minnesota, Kansas and Idaho, and charging “that its capital stock and surplus are entirely dissipated and gone, and that a computation of its assets and liabilities made according to the insurance laws of the state of Nebraska show that company is insolvent and unable to pay its claims or to

meet its liabilities to creditors or stockholders." The concluding portion of the prayer was:

"And further prays that pending the return of such order to show cause, and a hearing thereon, this court may issue an order restraining the defendant, the Lion Bonding & Surety Company, from the transaction of its business and from the disposition of any of its property, records and effects until the further order of this court; and for such other and further relief as may to the court seem just and equitable, under the circumstances." \* \* \*

There was no challenge made to the jurisdiction of the state court to entertain the petition of the Department of Trade and Commerce, nor to make the order that the Department forthwith seize the property, records and effects of the insurance company. No proceedings were had to set aside any of the orders of the state court for error or other cause. The record presents a refusal of the federal court to give effect to the state court's orders in a subsequent collateral proceeding. This, the federal court cannot lawfully do, on any other ground than a total want of jurisdiction of the court which made them. The present bill shows that the Lion Bonding & Surety Company answered the original petition, and the subsequent application for an order of liquidation presented to the state court. All questions concerning process and jurisdiction of the persons are, therefore, eliminated, and there remains only the inquiry concerning the state court's jurisdiction of the subject matter.

The operation of the state statute and the scope of the proceedings had thereunder, were interpreted by Judge Redick of the State District Court, as follows:

"May 28, 1921, it having been brought to the attention of this court that the Insurance Company had failed to take

any steps to cure its financial condition, and still continuing to be insolvent, this court made an order for the liquidation, which is still in force and being accomplished by the Department. \* \* \*

"The jurisdiction of this court to make the order on the original application by the Department is not questioned by any one; but it is said that possession was taken under that order for a temporary purpose only. It may be conceded that had the Insurance Company taken such steps as were necessary to enable it to continue business, such fact being shown to the court, the proceedings would have ended, and the assets would have been restored to the corporation; but no such action was taken. If it had been, and the company had been restored to a solvent condition there would have been no cause for the appointment of the receivers by the Minnesota court. What, then, was the jurisdiction of this court upon the default of the Insurance Company? Must the court continue these proceedings indefinitely, without hope of any beneficial accomplishment? Or must it send notice to the hundreds of courts, federal or foreign, that this court is unable to protect the rights of the creditors, stockholders and public in the control of a domestic corporation organized under the laws of the state from which the court derived its powers? An affirmative answer to either of these questions is absurd and unthinkable. It appears to me that when this court entertained the application of the Department of Trade and Commerce, and took possession of the assets of the Insurance Company under Section 4 (Tit. 5, Art. 3) of Chapter 190 of the Laws of 1919, it became possessed of jurisdiction (which is simply the right to hear and determine) to make and enforce all necessary and proper orders for the protection of the stockholders, the policyholders, creditors and the public, growing out of or connected with the insolvency of the company, including the right to liquidate the company and distribute its assets according to equitable principles."\*

\*NOTE.—The opinion of the state court here quoted is found in printed record, pp. 65-67, Case No. 557, Department of Trade and Commerce v. Hertz, General No. 29107.

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This view of the state court's power is in complete accord with *Ward v. Foulkrod* (C.C.A., 3rd Cir.), 264 Fed. 627, 633, in which it was said:

"The appointment of receivers by the Delaware Court was made in an action there first brought to administer the estate and continue the business for a period of indefinite duration, determinable later by the chancellor, according as the corporation arises or fails to arise from its condition of insolvency. \* \* \* The action of the state court, while it included the relief of conservation of the corporation's property (beyond which it had not yet proceeded) was not limited to relief of that character. It extended over the corporation, as long as its insolvency persisted, to the full measure of the jurisdiction conferred upon the court of chancery by the State of Delaware over the insolvent corporations of its own creation."

The United States Circuit Court of Appeals for the Third Circuit, in determining the extent of the jurisdiction of a state court of Pennsylvania in a proceeding against an insolvent insurance company of that state under a state law regulating insurance, practically identical with the Nebraska law, and in proceedings of a precisely similar character to those in the state district court in the present case, reached the following conclusion:

"The act of the *state* in bringing suit was the exercise of a governmental power; the acts of the *state court* in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the *entire subject matter* in litigation, and subject the property of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liquidation and distribution. We are, therefore, of opinion that the state court acquired jurisdiction not only of the corporation but of its property, upon the inception of the proceeding and, being the first to acquire jurisdiction, is entitled to retain it until the state has wrought its function, and until the



jurisdiction invoked has been exhausted." (Per WOOLEY, C.J., *O'Neil, Insurance Commissioner, v. Welch*, 245 Fed. 261,269.)

There was a recognition in the Third Circuit of the authority of Delaware and Pennsylvania, which, in the present case, was flatly denied by the lower court, to Nebraska.

What would become of the receivership proceeding in the Minnesota District if the stockholders should present a conclusive showing, at any stage, that the corporation had been restored to a condition of solvency and had paid its debts? When the cause for a receiver has been removed the proceeding must, in all cases, end. The incident of the order of the state court mentioned does not affect the jurisdiction to proceed with the liquidation in equity if insolvency persists, and involves no requirement to terminate the proceeding that does not inhere in every equitable proceeding for liquidation of insolvent corporations. The argument to the contrary is so refined as to tax patience.

## VIII.

The lower court erroneously held against the jurisdiction of the state court over the subject matter of the liquidation and distribution of the corporation's assets, on the false and inadmissible ground that the petition addressed to that court was deficient. The local rule in Nebraska, and the rule of federal courts, is, that defects in the pleadings are not a test of jurisdiction and cannot be availed of in a collateral proceeding.

The petition of the Department of Trade and Commerce on which the state court proceedings were initiated, was not defective in its allegations or prayer. The prayer for general relief is of statutory authorization, and is sufficient, under the practice in equity, to confer jurisdiction over the entire subject matter of dealing with a delinquent and insolvent insurance company; and both pleadings and process are amendable before or after judgment according to the state practice.

The argument that the petition presented to the state court by the attorney general is deficient in allegations or in its prayer for specific relief is also inadmissible. There was an allegation of insolvency and a prayer for general relief conforming to the local law. Such objections do not reach to the jurisdiction of the court over the subject matter, which is conferred by the statute, as the following authoritative precedents show.

In *Cooper v. Reynolds*, 10 Wall. 309, 316, Mr. Justice MILLER said:

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specifically conferred. \* \* \*

"Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order

as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

In *Insley v. United States*, 150 U. S. 512, 515, the Court per Mr. Justice BROWN, answering a contention that a judgment of the District Court of the United States for the District of Kansas on a bail bond, upon a writ of scire facias, was illegal and void, because the Kansas Code prescribed a formal civil action, said:

"It is sufficient answer to the appellant's contention, that the Court had jurisdiction of the subject matter under Rev. Stat., Sec. 563, which confers upon district courts jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States \* \* \* The error, if any, did not go to the jurisdiction of the court, but only to the particular remedy, and the action of that court in respect thereto was binding in a collateral proceeding. *Hendrick v. Whittemore*, 105 Mass. 23."

In *Union Trust Co. v. Southern Navigation Co.*, 130 U. S. 565, 571, 572, Mr. Justice HARLAN, answering a contention that relief granted in a prior suit was not within the purview of the bill or its prayer, said:

"Second. The relief granted in the Vose suit in respect to the agreement or contracts which the Southern Inland Navigation and Improvement Company claimed to have with the trustees of the Independent Improvement Fund was within the general scope of that suit, and was fairly covered by the prayer *for such relief as might be deemed just and equitable*. Besides, if that company was a party to the Vose suit, and we have seen that it was, the decree, so far as it rescinds the agreement or contracts it had with the trustees, and restores to the Internal Improvement Fund the lands covered by those contracts, was not

void. If erroneous, it could only be avoided by an appeal. It cannot be questioned in this *collateral proceeding*."

In *United States for Use of Hine v. Morse*, 218 U. S. 493, the Court in a well considered opinion, citing the previous judgments of this court, decided that the decree of a court having jurisdiction over the res and the parties, is not open to collateral attack, even though the court erred in holding that a case had been made, either under its inherent power as a court of equity, or its statutory authority.

The legal question is like that presented by a divorced wife, who, ignoring a decree of divorce, brings suit in another jurisdiction for divorce and alimony, in which this Court recently said:

"It seems well settled that where the affidavit used as the basis for an order of publication is defective, not in omitting to state a material fact, but in the mode of stating it or the degree of proof, the resulting judgment, even though erroneous and therefore voidable by direct attack, cannot be said to be coram non judice and therefore to be void on its face." (Per Mr. Justice PITNEY, *Thompson v. Thompson*, 226 U. S. 551, 566).

In *Simmons v. Saul*, 138 U. S. 429, it is said:

"We are of the opinion that, the jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court, cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action for annulment, as expressly provided in the articles of the code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed."

"Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur, in its exercise, the proceeding being coram judice, can be im-

peached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error." (Per Mr. Justice SWAYNE, *Nitt v. Turner*, 16 Wall. 366).

A statute of Nebraska provides:

"The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." (Comp. Stats. Neb. 1922, Sec. 8656.)

Under the statute, an insufficiency in any pleading or proceeding, does not go to the jurisdiction of the court. Amendments can be made before or after judgment. The uniform holding in the state court is that a judicial order cannot be avoided or treated as a nullity in a collateral proceeding, on the ground of the insufficiency of the pleading. (*In re Estate of Nelson*, 81 Neb. 363; *Dryden v. Parrotte*, 61 Neb. 339; *Logan County v. Carnahan*, 66 Neb. 697; *Howell v. Ross*, 69 Neb. 1).

That the state court's jurisdiction is to be exercised according to the laws of the state under which it is organized, and that the extent to which its proceedings are entitled to extraterritorial recognition under the full faith and credit clause of the constitution, is to be determined by the local law is expressly provided by the Act of Congress (U. S. Comp. St., 1916, Sec. 1520), and is a doctrine too familiar to require references in this presentation. While

the local law condemns the theory on which the lower court denied the power of the state court in this case, the ruling of the lower court also comes in conflict with the decisions of this court cited above. There is no basis, in either the local or the federal law, for the disregard of the orders in the prior proceeding in the state court.

What are the jurisdictional facts necessary to be averred within the purview of the local statute, in order to confer authority on the State District Court, to deal with the insurance company as an insolvent, including liquidation and distribution of its assets?

By Section 2, previously quoted, neglect to make good any impairment of its capital on notice of the Department (without judicial order) is a cause for proceeding against it as an insolvent company.

By Section 4, previously quoted, the fact of insolvency, and other separate causes entitles the Department to apply to the State District Court "for an order to show cause why the Department of Trade and Commerce should not take possession of its property, records and effects and *conduct or close its business, and for such other relief* as the nature of the case and the interest of its policyholders, creditors, stockholders or the public may require."

Subdivision 1 of said Section 4, from which we have last quoted, contains the provisions which, alone, define the nature of the application, the general scope of the relief that may be granted, and the grounds on which the application may be made.

Then follows, in numerous subdivisions, the nature of the orders that may be made, on "such application" and "on a like application," including orders to show cause,



for liquidation, dissolution, and approval of compensation to appointees assisting the department, and the like.

Clearly the application mentioned in Subdivision 1 of Section 4 is the only formal pleading on which the jurisdiction of the Court over the whole subject matter is based. The statute provides a single proceeding in which power is conferred on the court to take all the steps incident to a full and final liquidation of the Company, the distribution of its assets according to equitable principles, and dissolution of the corporation by decree.

The Statutory grounds for the proceedings, including impairment of the capital stock, insolvency and unlawful conduct of the business are averred directly and specifically. No deficiency in the substantive averments of the Department's application has been alleged by counsel or pointed out by the lower court in its opinion. The direct allegations of insolvency are so specific and so precisely cover the jurisdictional requirements of the statute, as to defy assertion of their deficiency in that behalf.

It is equally preposterous to ground a conclusion of the jurisdictional deficiency of that application on the circumstances that, in a proceeding contemplating further applications for orders in due course, under explicit statutory prescriptions, the subject of liquidation was only covered by the general prayer. The prayer followed substantially the language of the statute "for such other relief as the nature of the case and the interest of the policyholders, creditors, stockholders, or the public may require." The general prayer was thus of statutory sanction. But regardless of the statute, it is sufficient if the relief granted by the state court's order of liquidation was "within the general scope of that suit" and "fairly covered by the prayer for such relief as might be deemed just and equitable." Per Mr.

Justice HARLAN, *Union Trust Co. v. Southern Navigation Co.*, 130 U. S. 1c. 571, 572.

The contrary conception of the statute makes a jest of the judicial proceeding in the State Court which it authorizes. To avoid multiplying proceedings, is one ground of jurisdiction in equity, and one rule of equity is that when it assumes jurisdiction for one purpose, it holds jurisdiction to the end and gives all appropriate final relief in a single proceeding. The state legislature did not commit the folly of requiring a multitude of independent suits for liquidation of a domestic insurance company, and it is submitted that the power does not reside in a District Court of the United States to overturn or disregard the state court's order of liquidation by which it interpreted its own authority to grant final relief in a single action, nor to interrupt by injunction, or other process, the exercise of a jurisdiction in which it first took the possession and control of the res.

Here the federal court, whose territorial jurisdiction lies in a remote state, entertained a bill filed twenty days after the state court took possession of the res. Admittedly, the state court had jurisdiction for some purposes, not yet accomplished, when the federal receivers were appointed in a foreign district. Admittedly, the federal court could not then oust the state court's control of the res. The state court continuing to exercise its jurisdiction, and to determine for itself, as it might lawfully do, the extent of the powers conferred upon it by statute over the res, made an order of liquidation, on the theory that its original jurisdiction extended to that subject. The federal court then assumed the function to supervise the orders of the state court, to hold that the state court erred in its interpretation of the local statute, and that its erroneous interpretation of its powers, had shifted priority to the federal court; and, then, proceeded to arrest the prior proceedings of the state court

by the writ of injunction. It is submitted that neither Congress nor the Supreme Court has ever sanctioned such grasping of federal jurisdiction, nor such an assault on the dignity of a state tribunal. So far as Congress and this court have spoken, they have endeavored to leave the state court free to conclude its proceeding according to its own interpretation of the limitations of its jurisdiction, and have forbidden the use of the writ of injunction to arrest the State Court's proceeding. Being sanctioned "by the judgment in which the proceeding was had" the order of liquidation "cannot be treated by the federal courts as unauthorized." *Mutual Life, etc. v. Phelps*, 190 U. S. 159.

### IX.

The charter of the Lion Bonding & Surety Company, of which the Nebraska regulatory statute is a part, provides for its liquidation by a domicillary court. A suit to wind up and close its business is, therefore, a local action—at least where a domicillary court has taken jurisdiction of the subject matter.

The right of a corporation to conduct the business for which it is chartered is derived from the state which creates it. Whether the affairs of the corporation are to be *closed*, so that it cannot continue business, is a local question, controlled by the policy of the state by which it is created, the determination of which is reserved to the domicillary courts. Accordingly it is generally conceded that the functions of liquidation, through a general receivership, control of internal management, and dissolution can be exercised only by the domicillary courts.

Paragraph VIII of the Karatz bill declares its object as follows:

"That this action is commenced for the purpose of *closing up the business of said defendant*, and causing a just

and fair distribution of the property of said defendant to be made among its creditors."

That was a function that the State of Nebraska, by a charter provision, reserved to the direction of its own court, supposedly under the sanction and approval of the decision of this court in *Relfe v. Rundle*, 103 U. S. 222. The state was in exercise of this reserved authority before the federal court, sitting in another state, was appealed to by *Karatz* to take cognizance of the same subject matter. Whatever might be the rule, in the absence of such local statutory regulations, it is submitted that prior assumption of control of the corporate affairs, under such a statute, makes the action local in its nature, and excludes jurisdiction over the same subject by a foreign court.

In Nebraska, Virginia, New York and Massachusetts, this conclusion was announced, in the cases cited elsewhere in this brief, and was held to exclude attachment or other process against corporate assets found in states other than that of the residence of the corporation. Title to such corporate assets passes, by the local judicial proceeding, to the administrative agency of the state which created the corporation. This creates a complete agency for full and final liquidation, and dispenses with the occasions for resort to ancillary receiverships in foreign jurisdictions. Judicial approval of this method of local administration has necessarily made it an exclusive one. The departure in the present cases by the lower court is the only instance that we have found in which any court has denied the exclusive jurisdiction exercised by a domiciliary court under a statute like that of Nebraska.

Our reliance here is on the cases cited elsewhere in this brief, upholding the constitutional validity of regulations

like those of Nebraska governing the business of insurance and recognizing the extraterritorial rights of the state administrative agencies on whom the title of corporate property devolves for the purposes of liquidation. But aside from this narrow ground, and in the absence of such regulatory statutes, the practice of recognizing the exclusive power of the domiciliary courts over general receiverships of corporations, in administrative suits, is well recognized.

In *Hutchinson v. American Palace Car Co.*, 104 Fed. 184, PUTNAM, D.J., said:

"It is true that every state is entitled to take control, according to its own local rules, of property lying within it, and this independently of the question of domicile. Nevertheless, where the purpose is to wind up a corporation, or a joint-stock association, or a co-partnership, on account of an alleged insolvency or fraudulent transactions, or where it is desired to obtain a general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto. This question was incidentally before the presiding judge in Massachusetts, and the court refused to constitute a receivership of assets within the state of Massachusetts belonging to a corporation created by the laws of New Jersey, until application had been made to the United States Circuit Court for the District of New Jersey for the appointment of a general receiver."

In *Parks v. U. S. Bankers Corporation*, 140 Fed. 160, LACOMBE, C.J., in refusing to appoint a receiver in the Eastern District of New York for a Maine corporation, said:

"There is no reason why the parties should not take their controversy to the state of Maine, which created the corporation, and which, alone, has power to dissolve it. When receivers are there appointed this court will appoint ancillary receivers to conserve any property which may be here."

In *McGuire v. Mortgage Co.* (C.C.A., 2nd Cir.), 203 Fed. 858, the court on reversing an order appointing a receiver, said:

"It is apparent that this is a stockholder's suit for the winding up through a receiver of the affairs of the defendant corporation, and if it were a domestic corporation, we should look for a statute of New York authorizing the action prayed for. If we found such a statute and if it were broad enough to create a right in the complaint which could be enforced in the District Court as a court of equity by reason of diverse citizenship, we should say that the court had jurisdiction. Otherwise there would be no warrant for its intervention.

"But this is not the case of a domestic corporation. The defendant corporation exists under the laws of the State of Delaware and it is elementary that it is alone for the state which creates a corporation to provide for its dissolution and winding up. A Federal court of equity has no jurisdiction over an original stockholder's suit against a foreign corporation for the appointment of a receiver to wind up its affairs and distribute its assets. *Republican Nountain Silver Mines v. Brown*, 58 Fed. 644, 7 C.C.A. 412, 24 L.R.A. 776; *Sidway v. Missouri Land & Live Stock Co.* (C.C.A.), 101 Fed. 481. See also cases post.

"But it is urged that all the assets of the corporation are within this jurisdiction and that they may be wasted unless a receiver is appointed here. Well-established equity procedure provides for just such a situation. When a stockholder's suit has been brought in the courts of the state which created the corporation and a receiver has been appointed there, the Federal courts in other states will protect property within their jurisdictions by the appointment of ancillary receivers. *Parks v. U. S. Bankers Corp.* (C.C.), 140 Fed. 160; *Haydock v. Fisheries Co.* (C.C.), 104 Fed. 182."

This case is cited in *Hartford L. Ins. Co. v. Ibs*, 237 U. S. 671, to the point that courts of the domicile of a cor-



poration have jurisdiction of all questions relating to internal management.

A suit in equity to close up the business of a corporation and distribute its assets is one of a local nature, within the purview of Sections 54 and 55 of the Judicial Code, which can be primarily entertained only by the domiciliary court. *Primos Chemical Co. v. Sulton Steel Co.*, 254 Fed. 454, 459.

In *Ward v. Foulkard* (C.C.A., 3rd Cir.), 264 Fed. 627, 634, it was said by WOOLLEY, C.J.:

" \* \* \* It is elementary that the state which creates a corporation alone has the power to wind up its affairs and dissolve it. "

That local control of the government, internal management and dissolution of corporations is exclusive, is too well understood to require reference to authorities. These are matters within the jurisdiction of the state which creates the corporation, to be governed by the statutory regulations or charter of the corporation. The local regulations follow the corporation into every state in which it is permitted to transact business, and are recognized extraterritorially.

These elementary doctrines would seem incompatible with the power of a foreign court, through a general receivership of all corporate property, records and effects, wherever situate, to close the corporate business and distribute its assets equitably to its creditors and stockholders, as is the declared purpose of the Karatz bill. Upon the accomplishment of that object, we cannot see that there will be left open to the domiciliary state any of its recognized exclusive functions over the government of the corporation of its creation.

The extraterritorial recognition of the public acts and judicial proceedings of the State of Nebraska, here invoked, commanded by the Constitution, required renunciation of jurisdiction by the United States District Court for the District of Minnesota, upon the exhibition of the record of the proceedings in the District Court of Douglas County, Nebraska. It is submitted there can be no sort of justification for affirmance without modification of the order denying the motion to discharge the receivers since their appointment, in terms, vested them with extraterritorial control of all of the corporate property.

### X.

The injunction directed by the lower court to stay proceedings in the state court was in excess of its jurisdiction.

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (Judicial Code, Sec. 265.)

In this case an injunction *pendente lite* was directed by the lower court against the appointees of the state court.

"A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive, is but the possession of the court; and, when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is within both the letter and spirit? It is not enough to take a given case out of the statute, that the complainant, asking an injunction against action under such an order, a writ, or process from a state court, challenges the power of the court to make the order or issue the writ complained of." (*Phelps v. Mutual Reserve Ass'n*, 112 Fed. 467, per Mr. Justice LUTON, then Circuit Judge; affirmed in *Mutual Life Fund Ass'n v. Phelps*, 190 U. S. 147.)

"It is contended that such a supplementary proceeding (appointing a receiver on motion after judgment) is not warranted by the laws of Kentucky; that there is no statute of that state justifying it. But it has been sanctioned by the judgment in which the proceeding was had, and cannot be treated by the federal courts as unauthorized. *Laing v. Rigney*, 160 U. S. 531. See also *Leadville Coal Co. v. McCreery*, 141 U. S. 475. If not warranted by the law of the state, relief must be sought by review in the appellate court of the state and not by collateral attack in the federal court." (Per Mr. Justice BREWER, in *Mutual Life Fund Assn. v. Phelps*, 190 U. S. 147, 159.)

It is obvious that the Department of Trade and Commerce had, under the order of the state court, not merely the powers of a chancery receiver, but the enlarged powers conferred upon it by the State Civil Administrative Code, vesting in it, upon the entry of the order of liquidation, title to the corporate property and giving it the standing of an owner and proprietor in all courts, state and federal. (*O'Neill, Insurance Commissioner, v. Welch*, C.C.A., 245 Fed. 261; *Relfe v. Rundle*, 103 U. S. 222; *Bernheimer v. Converse*, 206 U. S. 516; *Converse v. Hamilton*, 224 L. S. 243; *Bockover v. Life Assn.*, 77 Va. 85; *Kinsler v. Casualty Co.*, 103 Neb. 382.)

It is also obvious that the Department of Trade and Commerce and its officers, are agencies acting as the hand of the state court and that their possession is that of the state court. The injunction against them operates to stay the proceedings in the state court and comes clearly within the prohibition of Section 265 of the Judicial Code.

There is no incident of the present case to take it out of the operation of the Code section invoked, or to bring it within any exception to its general scope. The state court had jurisdiction of the whole subject matter, so that its prior

jurisdiction and possession made the statute apply to withdraw jurisdiction to grant the injunction.

But if it were doubtful whether the scope of the state court proceeding was broad enough to include ultimate liquidation (which is denied), even then it was not open to a Federal District Court to determine the limits of the state court's jurisdiction in a prior proceeding that was still pending and proceeding in its orderly course. Such a theory would give the federal district courts supervisory powers over pending proceedings in the state court and such powers do not reside in the federal district courts. The authorities last above cited are conclusive of this proposition, and it is submitted that the injunction granted by the lower court is at war with the federal statute.

The question goes straight to the jurisdiction of the lower court, as a federal court, to grant relief by injunction to stay the proceedings in a state court, and to dispossess the state court of its prior control and possession of the corporate assets. "Unless the court below can enjoin the proceeding in the state court and prevent the receiver thus appointed from executing the orders and directions of that court, it is plain that no equitable jurisdiction exists." (Per Mr. Justice LUTON, *Phelps v. Mutual Reserve Assn.*, 112 Fed. 453, 466; affirmed 190 U. S. 147.)

It is well settled that an order of a federal court made in violation of a statutory or constitutional inhibition is in excess of its jurisdiction as a court of the United States and void. Persons committed for contempt of such orders are subject to discharge in this court by *habeas corpus*. (*Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 713, 718; *In re Sawyer*, 124 U. S. 200; *In re Ayres*, 123 U. S. 443; *In re Burrus*, 136 U. S. 586.)

"If those proceedings \* \* \* are to be considered as proceedings in a court of the state (of which we express no decisive opinion) the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except when authorized by a bankrupt act." (Per Mr. Justice GRAY, *In re Sawyer*, 124 U. S. 200, 219, citing statute and adjudge cases.)

The judgments of this court interpreting and applying Section 265 of the Judicial Code are so numerous and familiar that exhaustive references would needlessly burden the presentation. In the recent case of *Essanay Film Manufacturing Co. v. Kane*, 42 Sup. Ct. Rep. 318, this court held, per Mr. Justice PITNEY, that the Code section invoked forbids the courts of the United States from restraining proceedings in a state court even upon the ground that the attempted service of process was lacking in due process of law.

In *American Association v. Hurst*, C.C.A., 59 Fed. 1, property of a stranger to a writ from a state court was levied on and about to be sold on execution. The lower court denied a writ of injunction. In affirming the judgment below, the present Mr. Chief Justice (then Circuit Judge of the Sixth Circuit) said:

"The principle is that, in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent jurisdiction, and to avoid unseemly conflicts between them and between their respective executive officers, no remedy of an injunction or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done *under color* of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to *stay proceed-*

*ings in one court to allow another court to investigate the validity of acts done under such proceedings."*

It is therefore submitted that in directing the issuance of an injunction against the statutory appointees forbidding their obedience to the orders of the state court, the Circuit Court of Appeals usurped a power expressly withheld by Section 265 of the Judicial Code of the United States.

## **XI.**

**The suit against the Department of Trade and Commerce is one against the state, within the meaning and purview of the eleventh amendment of the constitution, to which the judicial power of the United States does not extend.**

The parts of the record incorporated in the statement in Chapter I of this brief show conclusively the following facts:

1. The Department of Trade and Commerce, and its officers, have no personal interest in or claim to the property affected by the proceedings. They are holding the property and acting in the state court proceeding solely as representatives of the State of Nebraska.

2. The individual defendants, impleaded as officers and directors of the Insurance Company, were shown not to have intermeddled in the administration proceedings since they were enjoined from so doing by the state court at the beginning of the Department's suit. Appellee's controversy is, therefore, wholly with the State Department of Trade and Commerce.

3. The constitutional validity of the regulatory provisions of the Civil Administrative Code, under which the Department of the state obtained prior possession of the



corporate property by order of the State District Court, is not questioned by appellees anywhere in the record. On the face of the record, therefore, the purpose of the bill, and the operation of the decree appealed from, are to enjoin and arrest orderly judicial proceedings by state officers for the execution of lawful police regulations.

On the face of these observations it is plain that this suit does not fall within any of the classes in which, for application of the Eleventh Amendment, the state officer or department is to be treated as an individual.

The rule is well settled that in determining whether a suit is within the prohibition of this amendment, reference must be had to the real party in interest, and not merely to the parties in the record. The amendment applies to any suit brought, in name, against an officer of a state, when the state, though not named, is the real party against whom relief is asked, and against which the judgment will operate. (*Poindexter v. Greenhow*, 114 U. S. 270; *Ex parte Ayres*, 123 U. S. 443; *Minnesota v. Hitchcock*, 185 U. S. 373, 386.)

The present record exhibits the anomaly of enjoining state officers from continuing a prior suit brought in a state court to enforce a confessedly valid statute, enacted in exercise of the police power. The case is, apparently, unprecedented.

"If the legislation is invalid, under which the defendants assume to act, they do not represent the state. They are acting without its authority—without the authority of the law—and are responsible for their acts as private individuals. On the other hand, if this legislation is valid, they represent the state, and the suit, in substance and effect, is against the state. Such a suit is forbidden by

the Eleventh Amendment to the Constitution of the United States, which declares: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state'." (*McConaughy v. Pennoyer*, 43 Fed. 199.)

The decision quoted is from a Circuit Court, but the conclusion is inescapable. It is drawn unavoidedly from the process by which this court has, in a long line of cases, excluded the application of the Eleventh Amendment to suits against state officers, upon the ground that their acts were done or threatened under legislative acts that were invalid. The consideration which in numerous cases led this court to that conclusion is that the officers were acting without authority of law, were trespassers, and so responsible for their acts as private individuals, and, therefore, did not represent the state. So, conversely, it must be that the officer who proceeds under a confessedly valid statute, under authority of law, is an agency of and represents the state.

In such cases a challenge by the bill of the constitutional validity of the statute being enforced by the proper state officers, is indispensable, in order to avoid the application of the Eleventh Amendment. The omission of such averment, and the virtual confession by the bill of its validity, are fatal to the jurisdiction.

"He (Insurance Commissioner) is an officer of the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations." (Per Mr. Chief Justice WAITE, in *Relfe v. Rundle*, 103 U. S. 222, 225.)

In *O'Neill v. Welch*, *Insurance Commissioner*, 245 Fed. 261, 267, 269, the Circuit Court of Appeals for the Third

Circuit, per WOOLEY, C. J., after considering at length an act of Pennsylvania essentially like that of Nebraska, announced the following conclusions:

"The jurisdiction of the state court thus invoked is a special jurisdiction conferred by statute as *a part of the state's policy of insurance regulation and control*. It is not conferred for the protection of corporation's policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company *the state is acting for the public*, and the public is in turn interested in the proceedings; though not *nomi-nally* present as a party, *it is nevertheless present in the person of the Attorney General*."

"*The act of the State in bringing suit was the exercise of a governmental power; the acts of the state court in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the entire subject matter of the litigation, and subject the property of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liqui-dation and distribution.*"

The issue is: Shall the State, by its duly appointed officers, be permitted to perform its government function by concluding the statutory proceeding for enforcing its own police regulations? It is the function and enterprise of the state that is interrupted and obliterated by the proceedings and final decree under review. The officers are the mere nominal and representative parties by whom the state's presence is effected. It is obvious, therefore, that the failure of the bill to assert the constitutional invalidity of the state law under which appellant's took possession of and hold the corporate property, leaves applicable the Eleventh Amendment, and is fatal to the jurisdiction in the suit brought in the Nebraska District against the officers of the state.

## XII.

A federal equity court cannot take cognizance of a suit by a simple contract creditor whose claim has not been reduced to judgment to appoint a receiver for property upon which he asserts no specific lien by way of mortgage or pledge and in which he asserts no special property right or interest in equity as a stockholder, or otherwise.

It requires something more than the exhibition of the mere jurisdictional amount to give a suitor standing to invoke a purely equitable remedy. Certain jurisdictional requisites are necessary in addition to the jurisdictional sum in order to justify the exercise of purely equitable powers.

It is firmly settled by the decisions of this court that a court of equity of the United States has no power to appoint a receiver at the suit of a simple contract creditor who has not invoked nor exhausted his remedy at law for property upon which the complainant asserts no specific lien and in which he claims no specific equitable interest or title. No equitable interest can be asserted by a creditor of a corporation in its property until he has first reduced his claim to judgment. *Cates v. Allen* 149 U. S. 451; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371; *Smith v. Railroad Co.*, 99 U. S. 398; *Maxwell v. McDaniels* (C.C.A., 4th Cir.), 184 Fed. 311, 315; *Davidson-Wesson Imp. Co. v. Parlin & Orendorf Co.* (C.C.A., 5th Cir.), 141 Fed. 37, 40; *Harrison v. Farmers Loan & Trust Co.* (C.C.A., 5th Cir.), 94 Fed.

In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, Mr. Justice BREWER said:

"The plaintiffs were simple contract creditors of the company; their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or

otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarkation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation. *Scott v. Neely*, 140 U. S. 106 (35; 358); *Cates v. Allen*, ante, p. 804. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *National Tube Works Co. v. Ballou*, 146 U. S. 517 (36:1070); *Swan Land & C. Co. v. Frank*, ante, pp. 577, 580. Nor is the rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor."

Mr. Justice BREWER, in the same case, further said (150 U. S., pp. 385, 386):

"Neither the insolvency of the corporation nor the execution of an illegal trust deed nor the failure to collect in full all stock subscriptions, nor all together, give to these simple contract creditors any lien upon the property of the corporation nor charge any direct trust thereon."

In *Cates v. Allen*, 149 U. S. 456, 457, it was said in the opinion by Mr. Chief Justice FULLER:

"Complainants were simple contractors, who had not reduced their claims to judgment, and therefore had no standing in the United States Circuit Court, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance. The suit was originally brought in the state court under sections 1843 and 1845 of the code of Mississippi of 1880, which provided that the chancery courts of that state should have jurisdiction of bills exhibited by creditors who had not obtained judgments at law, or who, having judgments, had not had executions returned unsatisfied, to set aside fraudulent conveyances of property

or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and might subject the property to the satisfaction of the demands of such creditors as if the complainants had had judgment and execution thereon returned no property found; and that 'the creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill.'

"These sections were considered in *Scott v. Neely*, 140 U. S. 106, and it was therein determined that the circuit courts of the United States in Mississippi could not under their operation take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt, or to enforce its collection. It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of demands cognizable in the courts of the United States only on their law side could not be sought in the same action, although allowable in the state courts by virtue of state legislation; *Bennett v. Butterworth*, 52 U. S. 11 How. 669 (13 §59); *Thompson v. Central Ohio R. Co.*, 73 U. S. Wall. 134; *Scott v. Armstrong*, 146 U. S. 499, 512, and that the code of Mississippi in giving to a simply contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States in conflict with the constitutional provision by which the right to a trial by jury is secured."

In *Davidson-Wesson Imp. Co. v. Parlin & Orendorf Co.* (C.C.A., 5th Cir.), 141 Fed. 37, 40, the court, in reversing



an order appointing a receiver at the suit of a simple contract creditor, says:

"Counsel calls his bill a creditor's bill; but it is settled since the beginning that a simple contract creditor has no standing in a court of equity to enforce payment of such equities until after he has reduced his demand to judgment and has exhausted his remedy at law."

In *Harrison v. Farmers Loan & Trust Co.*, 94 Fed. 728, the court said:

"The appellants were simple contract creditors of the Greenville Water & Electric Light Company. Their claim had not been reduced to judgment, and they had no express lien, by mortgage, trust deed, or otherwise. It is well settled by the supreme court that such creditors cannot come into a court of equity to obtain a seizure of the property of a debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. *Hollins v. Iron Co.*, 150 U. S. 371, 378, 14 Sup. Co. 127; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. It follows that the demurrer was properly sustained in the circuit court."

In *Maxwell v. McDaniels* (C.C.A., 4th Cir.), 184 Fed. 311, 314, 315, the court said:

"At the time the receivers were appointed the complainant's claim had not been reduced to judgment. A Federal Court of Equity was therefore without jurisdiction to hear his complaint that his debtor had made a fraudulent conveyance of his property. *Scott v. Neely*, 140 U. S. 108 \* \* \*; *Cates v. Allen*, 149 U. S. 451 \* \* \*. The court of equity of the United States has no jurisdiction at the instance of a simple contract creditor when the claim has not been reduced to judgment to appoint a receiver for property upon which he asserts no specific lien. 1 Street's Fed. Equity Proceed., Sec. 66; *Smith v. Railroad*

*Company*, 99 U. S. 398, 25 L. Ed. 437; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 377."

The above rule was reaffirmed in *Re Reisenberg*, 208 U. S. 109, 110; but it was held a defense that the claim was not reduced to judgment is waived by assent to receivership. In the present case the point was specifically urged below in the motion to dismiss the bill; and the appointment was not by assent, and was assailed by a motion to discharge the receivers.

No equitable title or claim is presented such as is necessary to give an equity court jurisdiction to appoint a receiver. Upon this separate ground also the insufficiency of the bill necessitates its dismissal for want of jurisdiction and the discharge of the receivers and the restoration of any property seized by them.

It is conceded that where no remedy at law is open, equity will, upon that ground, in some cases, assume jurisdiction. That was true in *Williams v. Adler-Goldman Commission Co.*, 227 Fed. 374, where the defendant was without the jurisdiction. But it is maintained that an averment of insolvency alone does not bring the case within any exception to the rule making a judgment at law an essential to standing as a creditor in a federal equity court. The bill must aver facts "showing that it is impossible to obtain such a judgment within such jurisdiction." *National Tube Works v. Ballou*, 146 U. S. 517 523.

*Case v. Beuregard*, 101 U. S. 688, 690, was considered and discussed by Mr. Justice BREWER in the later case of *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, and held not to be any authority for dispensing, in such cases as this, with the requirement of first obtaining a judgment at law. It was held in the latter case that insolvency alone

gave the simple contract creditor no interest in or lien upon the property of the corporation.

The Karatz bill alleged no sufficient ground for failure to obtain a judgment at law, and for failure to exhibit his standing as a creditor. The defendant was not beyond the reach of the process of the Minnesota courts, and an equitable proceeding in rem, against defendant's properties, was not a necessity, nor his only resort.

The laws of Minnesota require of an insurance company organized under the laws of another state, as a condition of its right to do business in that state, a formal appointment of the Insurance Commissioner as its attorney in fact for the service of judicial process, as follows:

"3. By a duly executed instrument filed in the office of the Commissioner, it shall appoint him and his successors in office its lawful attorneys in fact, and therein irrevocably agree that legal process in any action or proceeding against it may be served upon them with the same force and effect as if personally served upon it, so long as any of its liability exists in this state." (Gen. Stats. Minn., 1913, Sec. 3591, Subd. 3.)

The chancery subpoena in this suit was personally served on the Insurance Commissioner, pursuant to the above provisions. (Printed Record, Case No. 574, p. 22.) With equal facility service could have been made in a suit at law; but in a law action the federal court, because of the smallness of the claim, would not have had jurisdiction. It was necessary to avoid the jurisdictional limitation of the sum in controversy in order to invoke the powers of the federal court. The way to so avoid that limitation will be easy, if this court approves of a resort to equity by a simple contract creditor, and the aggregation of distinct claims, or reference to gross value of defendants' assets, to de-

termine the jurisdictional sum, in any case where a simple contract debtor is alleged to be insolvent.

Administration of insolvent estates is no doubt within the general powers of equity. And so, it is very consistently held, the objection here presented is one which the equity practice requires to be made *in limine*. Otherwise it is regarded as waived. It was made in this case by a motion to dismiss the bill, and has been insisted on at every stage of the proceeding. The merits of the contract demand was, of course, not in issue on the motion to dismiss the bill for want of jurisdiction in equity. Defendant had a right to stand on its motion, and avoid risk of any inference of waiver by answering to the merits, and that course is the one which it pursued.

If there is any substance to the alleged risk of preferences by attachments, that circumstance would prove that the plaintiff had an adequate legal remedy by suing out a writ of attachment in a suit at law. We maintain that there is no substantive averment of any jurisdictional ground for resort to equity, other than the allegation of insolvency. By the explicit holdings in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, and *Cates v. Allen*, 149 U. S. 456, the allegation of insolvency is not a sufficient jurisdictional averment to warrant a simple contract creditor's resort to equity. It is submitted that it is not competent for the Circuit Court of Appeals for the Eighth Circuit to establish and apply a rule that is out of harmony with those cases, and that this court should exact observance of its own authoritative judgments by all courts of the United States.

## XIII.

The bill filed in the federal court at Minneapolis shows on its face that the sum in controversy is less than \$3,000.00, and the court, on the face of the bill, was without jurisdiction of the subject matter.

The federal precedents conclusively establish that one having a separate liquidated demand cannot, by his mere self-appointment, sue for himself personally and on behalf of other creditors who may or may not subsequently elect to become complainants, and aggregate his claim with those of all other creditors of the same defendant for the purpose of making up the jurisdictional amount requisite to federal jurisdiction. The sum in controversy for the purpose of determining jurisdiction is the amount of plaintiff's separate demand, which in this case, is stated in the bill to be only \$2,100.00; and, therefore, on the face of the bill, the District Court was without jurisdiction of the subject matter. *Title Guarantee & S. Co. v. Idaho*, 240 U. S. 136; *Clay v. Field*, 138 U. S. 464; *Eberhart v. N. W. Mut. Ins. Co.* (C.C.A., 6th Cir.), 241 Fed. 353; *Robinson v. West Va. Loan Co.*, 90 Fed. 770; *Vance v. Vandertook*, 170 U. S. 468; *Pinell v. Pinell*, 204 U. S. 594; *Troy Bank v. Whitehead*, 222 U. S. 39; *Rogers v. Hennepin County*, 239 U. S. 621; *Wheless v. St. Louis*, 180 U. S. 379; *Woodside v. Beckham*, 216 U. S. 117; *Waite v. Santa Cruz*, 184 U. S. 302-328.

In *Pinell v. Pinell*, 240 U. S. 594, the holding, as stated in the syllabus, is as follows:

"The amount in controversy essential to the jurisdiction of a federal district court is not involved in a suit by two children to establish their alleged title to an undivided interest in their deceased father's real property, based upon his omission, through accident or mistake, to provide for them in his will, where the value of neither complainant, taken separately, equals the jurisdictional amount."

In the opinion (240 U. S. 596) it is said:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Clay v. Field*, 138 U. S. 464, 479; 34 Fed. 1044, 1049, 11 Sup. Ct. Rep. 419. *Troy Bank v. Whitehead*, 222 U. S. 39; 56 L. ed. 81; 32 Sup. Ct. Rep. 9. This case comes within the former class, since the title of each complainant is separate and distinct from that of the other; it being evident that the testator's omission to provide for one of his children by will, based upon mistake or accident, is independent of the question whether a like mistake was made with respect to the other child."

In *Vance v. Vandertook Co.*, 170 U. S. 469, the Court, by Mr. Justice WHITE, said:

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach, even though the damages be laid in the declaration at a larger sum."

In *Clay v. Field*, 138 U. S. 464, the court said:

"A question has been raised as to the jurisdiction of this court to entertain the appeal of Mrs. Freeman. The decree against her is only for the sum of \$2,667.28, but little more than half the sum necessary for an appeal to this court. Her case is a distinct one, and her appeal is a distinct and separate appeal. We do not see how it can be so connected with that of D. I. Field, the other defendant, as to be an incident of his, or ancillary thereto. Her estate of dower was a distinct estate, and she prosecuted her supposed



rights thereto in a distinct and separate proceeding. The decree against her is that she refund the amount above named to the complainant from whom she had recovered it in a separate action by way of damages, or rents and profits in dower. Unless the action of dower is exempt from, or excepted out of, the Act fixing the jurisdictional amount necessary for an appeal, we have no jurisdiction in this case. We are not aware of any ground on which such exemption or exception can be placed. It seems to us that the case comes clearly within the principle which has governed the decisions of this court in a large number of cases, in one of the latest of which, *Gibson v. Shufeldt*, 122 U. S. 27, pp. 30:1083, the previous cases are reviewed and classified. We refer particularly to the cases of *Henderson v. Wadsworth*, 115 U. S. 264, 29:378; *Stewart v. Dunham*, Id. 61, 329; *Hawley v. Fairbanks*, 108 U. S. 543, 27: 820; *Farmers L. & T. Co. v. Waterman*, 106 U. S. 265, 27:115; *Russell v. Stansell*, 105 U. S. 303, 26:989; and *Seaver v. Bigelows*, 72 U. S., 5 Wall. 208, 18:595. Many other cases stand in the same category, but they are referred to and commented on in the cases cited. The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone. The principal cases in which the interest has been deemed common and undivided, and appeals have been sustained, are *Shields v. Thomas*, 58 U. S. 17, How. 3, 15:93; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25:782; *The Connemara*, 103 U. S. 754, 26:322; *The Mamie*, 105 U. S. 773, 26:937; *Davies v. Corbin*, 112 U. S. 36, 28:627; *Estes v. Gunter*, 121 U. S. 183, 30:884, and *Handley v. Stutz*, 137 U. S. 366, 34:706. Mrs. Freeman's case does not come within the principle of any of these cases. As before stated,

the estate of dower claimed by her was a distinct estate, and she sued for it in a separate proceeding. She and her son are joined in this suit because they claim interests in the same land, namely, D. I. Field's undivided half of the Content plantation, which the complainant seeks to have subjected to the partnership liabilities; but the interests severally claimed by them in said land are entirely distinct and separate from each other. Mrs. Freeman's appeal, therefore, will have to be dismissed."

In *Troy Bank v. Whitehead*, 222 U. S. 39 (56 L. Ed. 81), the Court said:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Shields v. Thomas*, 17 How. 3, 15 L. Ed. 93; *Rodd v. Heartt*, 17 Wall. 354, 21 L. Ed. 627; *Davies v. Corbin*, 112 U. S. 36, 40; 28 L. Ed. 627, 629; 5 Sup. Ct. Rep. 4; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. Ed. 1083, 7 Sup. Ct. Rep. 1066; *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 36 L. Ed. 66, 12 Sup. Ct. Rep. 364; *Walter v. Northeastern R. Co.*, 147 U. S. 370, 373; 37 L. Ed. 206, 208; 13 Sup. Ct. Rep. 237; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410, 21 Sup. Ct. Rep. 251."

*Title Guaranty & S. Co. v. Idaho*, 240 U. S. 136, presented the question of the right to aggregate claims for jurisdictional purposes on an assignment of error against the denial of a petition of removal, on a writ of error to the higher court of the state. The action was by the state for the use of depositors of a failed bank against the bank commissioner and the surety of his official bond. The claims aggregated \$30,000.00, but none of the beneficiaries had a demand in excess of \$3,000.00. In holding against the right

to aggregate the individual claims to make up the jurisdictional amount necessary to remove the suit to the federal court, the Chief Justice said:

"And if we were to accede to the contention made in argument that the state must be treated as merely a nominal party, and the right to remove be then determined by the citizenship of the individuals for whose benefit recovery was allowed, it would yet follow, since none of the distinct judgments in favor of any of the individuals are large enough to confer jurisdiction, that the court below held correctly that there was no basis for the right to remove. *Woodside v. Beckham*, 216 U. S. 117, 54 L. ed. 408, 30 Sup. Ct. Rep. 367; *Troy Bank v. G. S. Whitehead & Co.*, 222 U. S. 39, 55 L. ed. 81, 32 Sup. Ct. Rep. 9; *Rogers v. Hennepin County*, 239 U. S. 621, 60 L. ed. 469, 36 Sup. Ct. Rep. 217."

In *Eberhard v. N. E. Mut. L. Ins. Co.*, 241 Fed. 353 (C.C.A., 6th Cir.), three holders of semi-tontine policies, each of \$3,000.00, united in a bill of equity, in their own behalf and on behalf of all others similarly situated. It was averred that all holders of such policies surviving a stated term and having paid all premiums, were entitled to share a fund created by the excess premiums over cost of insurance, and by excess payments of those who did not survive, or who forfeited right of participation; that this fund, amounting to millions, was held in trust by the company for all holders of similar policies, and that the fund had been diverted to purposes inconsistent with the rights of holders of tontine policies. The prayer was for an accounting and for a receiver of the fund if it should be found the trust should be terminated.

In holding that the claims could not be aggregated in order to make up the jurisdictional amount, the court said in part:

"The right each has in the fund is based upon the separate, distinct contract each has with the company with respect thereto. The sole matter in dispute is between the defendant and each complainant as to what the latter shall recover. Each policy holder has no demand upon any other; his demand is against the defendant alone, and what he may receive from the defendant can in no way affect the claims of others. The policy holders' claim to the funds are several, and not joint, and the amount payable to each depends upon his contract alone. Under these circumstances the separate claims cannot be aggregated for the purpose of making a case within the jurisdiction." (241 Fed. 355, 356.)

Answering the contention that the suit was maintainable as a "class action," the court said in part:

"Assuming that such a case as this may be called a class action \* \* \* yet, that it may be properly a class action does not affect the rule against aggregation, because the rule is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein. With respect to the rule and to class actions, members of this court have said: 'The principle upon which such an aggregation can be employed as a test of jurisdiction is that the persons joining in the suit must have a common and undivided interest, not distinct interests, in the amount involved; still that is not to say that, if the property involved is in truth separately owned and held, the parties may not constitute a class who may be joined for the sake of convenience and economy; it is to say that aggregation of their pecuniary interests is not permissible for making up the jurisdictional amount.'" (Quoted from *Nolan v. Reichman*, 225 Fed. 812, 816.)

In a suit by a class to enjoin collection of a tax imposed on each member, the interests of the individuals cannot be aggregated to make up the jurisdictional sum requisite to sue in the federal court. *Rogers v. Hennepin County*, 239 U. S. 621; *Wheless v. St. Louis*, 180 U. S. 379.

Claims cannot be aggregated for the purpose of jurisdiction by assignment for purposes of collection. *Woodside v. Beckham*, 216 U. S. 117; *Waite v. Santa Cruz*, 184 U. S. 302, 328.

It is conceded that there is a class of cases in which the plaintiffs may have an undivided interest in the enforcement of a single contract right for which there could be but a single action, the law refusing to split the demand into several parts and subject the defendant to a multiplicity of suits for the enforcement of an obligation on his single contract. There is a class of cases in which the demand is invisible because of the nature of the relationship existing between plaintiffs, such as suits by partners. In all such cases the interest sought to be enforced by plaintiffs is single and is properly aggregated for the purpose of determining federal jurisdiction.

But here a loss draft, which is the sole basis of plaintiff's claim, is a separate and distinct contract and a separate demand in which no other creditor can, upon any theory, claim any interest. On the facts alleged by the bill, plaintiff can have no interest in any separate demand of any other general creditor of the Lion Bonding & Surety Company. On the authorities cited, it is clear, therefore, that plaintiff cannot aggregate his demand with the separate and individual claims of other creditors in order to make up the jurisdictional amount necessary for federal jurisdiction. *Title Guaranty & S. Co. v. Idaho*, 240 U. S. 136, and *Eberhard v. N. W. Mut. Ins. Co.*, 241 Fed. 353, and the other cases above cited, are therefore authoritative and conclusive against the respondent on the issue of jurisdiction of the subject matter.

#### XIV.

##### Conclusion

The decree of the United States District Court for the District of Nebraska dismissing the bill of the Minnesota receivers, *Hertz and Levin*, against the Department of Trade and Commerce, was, upon the obviously just considerations here presented, correct, and the only lawful disposition that could be made of it. It is, therefore, submitted, that the decree of the Circuit Court of Appeals in that case should be reversed and the decree of the District Court dismissing that bill reinstated.

If any of the jurisdictional objections to the sufficiency of the bill of *Karatz* against the Lion Bonding & Surety Company in the United States District Court for the District of Minnesota be sustained, a reversal of the decree of affirmance in that case by the Circuit Court of Appeals, with directions to the District Court to dismiss the bill for want of jurisdiction, will necessarily follow.

But if all the jurisdictional objections to the *Karatz* bill be determined adversely, it is submitted that in any event the unqualified affirmance of the order defining the jurisdiction and authority of the receivers and the final decree which continued the extraterritorial powers of the receivers should be modified and revised so as to limit the powers of the receivers to the control and custody of the corporate property within the District of Minnesota for the purposes of conservation; with directions to surrender and deliver the same to the Department of Trade and Commerce of the State of Nebraska, upon its application, if it shall be made to appear that the District Court of Douglas County, Nebraska, in the suit of said Department against the Lion Bonding & Surety Company, has retained jurisdiction for



that purpose and has made an order therein directing the said Department to liquidate said Company.

The record shows that a duly certified transcript of the proceedings of the state court in that suit, was filed in the *Karatz* suit in support of the motion to discharge the receivers. But that transcript was made, certified and filed, before the date of the order of liquidation. The order of liquidation was not before the Court in the *Karatz* suit, but the proceedings embraced in the transcript filed showed that the state court had taken jurisdiction of the affairs and property of the insurance company in a proceeding which comprehended the entire subject matter of winding up and closing the affairs of the company. If the District Court of the Minnesota District had jurisdiction for any purpose, and the circumstance that the order of liquidation, though entered in Nebraska two days prior to the hearing, and called to the attention of the Court by counsel, but not formally proved, as the opinion of the District Judge shows, requires the deference of a formal application and proof of the order of liquidation, as a condition of surrender of the Minnesota property, the petitioners will cheerfully observe the proprieties. But if the Court finds the *Karatz* bill deficient in jurisdictional averments, it is submitted that there should be an unqualified reversal of the decree of the lower court in that case and a direction to the District Court to dismiss the bill for want of jurisdiction.

Respectfully submitted,

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HALLECK F. ROSE,  
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PAUL L. MARTIN,  
AMOS THOMAS,

*Counsel for Petitioners.*

O. S. SPILLMAN, *Attorney General of Nebraska, of Counsel.*

# RESPONDENT'S

# BRIEF

FILED  
FEB 20 1923  
WM. H. STANS

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 574

LION BONDING AND SURETY COMPANY,  
*Petitioner,*

vs.

A. H. KARATZ,  
*Respondent.*

No. 467

DEPARTMENT OF TRADE AND COMMERCE OF THE  
STATE OF NEBRASKA, ET AL.,  
*Petitioners,*

vs.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the  
LION BONDING & SURETY COMPANY,  
*Respondents.*

*Writs of Certiorari to the United States Circuit  
Court of Appeals for the Eighth District.*

### BRIEF OF RESPONDENTS.

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondents.



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*Respondents.*

---

*Writs of Certiorari to the United States Circuit  
Court of Appeals for the Eighth District.*

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## BRIEF OF RESPONDENTS.

---

### STATEMENT OF CASE.

*Case No. 574.*

It is conceded that the Lion Bonding & Surety Company was organized under the laws of the

State of Nebraska and that it engaged in the business for which it was organized in nineteen states, in all of which it was licensed; that in the State of Minnesota it maintained a general agency office and did a large proportion of its entire business; that in the course of its business in Minnesota it had outstanding a very large amount of liability insurance and also had written and had outstanding in Minnesota policies of theft insurance and obligations upon a large number of bonds which it had signed as surety for the performance of construction contracts, fidelity bonds and other obligations in an amount exceeding \$100,000.00; and had numerous agents within the federal district in which the present suit was brought, and within the State of Minnesota, applying themselves to the conduct of its business therein; that it had an undivided interest in a tract of land near Duluth, Minnesota, and owned contracting equipment and other assets in the State, in addition to insurance premiums due it.

A report of the condition of the company which had been made by the Insurance Departments of Minnesota and five other states had been filed with the Insurance Commissioner of the State of Minnesota in April, 1921, and with the insurance departments of other states in which the company had been doing business; this report disclosed that the capital and surplus of the company was entirely dissipated and that the company was insolvent.

The Department of Trade and Commerce of the State of Nebraska, which is the insurance department thereof, and which had up to this time been supervising and regulating this company, on April 9, 1921, under Sub-division 2 of Section 4 of Article III, Title 5, Laws of Nebraska, 1919, made a petition to the District Court of Douglas county, Nebraska, setting forth the incorporation of the Lion Bonding & Surety Company in October, 1907, the fact of the examination herein above referred to, which more fully appears on pages 34 to 77 of the Transcript of Record herein and alleged that it would be hazardous to the stockholders, creditors, policy-holders and the public to permit the corporation to continue to do business and that its capital and surplus had been entirely dissipated and that according to computation of the assets and liabilities made by that Department it was without capital and surplus; that it had violated the laws of the State of Nebraska, and had accepted improper investments and done other unlawful acts and prayed that the court, among other things, but chiefly, "direct the Department of Trade and Commerce to take possession of the property, records and effects and *conduct the business* of the defendant corporation, the Lion Bonding & Surety Company, and retain such possession and conduct the business until such time as after a hearing it shall appear to the Court that the cause of the order directing the Department of Trade and Commerce to take possession has been removed and that the company can properly re-

sume possession of its property, records and effects and the conduct of its business." (Transcript of Record, p. 31 et seq.) Thereupon and on April 12th, 1921, the District Court of Douglas county, Nebraska, ordered and decreed that the Department "shall and is hereby ordered to take possession forthwith of the property, records and effects and *conduct the business* of the defendant company, the Lion Bonding & Surety Company, and retain such possession and *conduct the business* of such company until such time as after a hearing it shall appear to the court that the cause of this order has been removed and that the company can properly resume possession of its property, records and effects and the conduct of its business" (Transcript of Record, pp. 80 & 81), thus granting no relief except that specifically requested in the petition. One Amos Thomas was appointed agent of the Department, and at a salary of \$1,000 a month, proceeded to conduct the business. Although the sole object of this proceeding appears to have been to enable the Lion Bonding & Surety Company and its officers to correct the evils with which it had been charged and to replenish the funds which they had been accused of having improperly used, yet the record is silent as to anything having been done either by the Department of Trade and Commerce or by the officers and stockholders of the Lion Bonding & Surety Company towards rehabilitating the company.

In April, 1921, suits were being commenced, judgments were being entered and executions ap-

plied for in the various states in which the Lion Bonding & Surety Company had been doing business, a number in Minnesota having been brought to the attention of respondent herein; and upon a large number of checks which the company had issued, payment had been refused for lack of funds, and the license of the company to do business in the State of Minnesota was revoked by the Insurance Commissioner of Minnesota.

On May 2, 1921, the respondent filed his complaint in equity in the District Court of the United States for the District of Minnesota in behalf of himself and all other parties similarly situated who might desire to make themselves parties, against the petitioner, in which it was charged that respondent was a citizen of the State of Minnesota and the petitioner a corporation of Nebraska; that the petitioner had been writing a large amount of insurance business in the State of Minnesota and that it had given a draft for the sum of \$2100.00 to one of its policy-holders to whom it had become liable upon an insurance loss and that said draft by proper endorsement in due course of business and for a valuable consideration had become the property of respondent; that in the usual course of business the draft had been presented for payment and payment thereof had been refused for the reason that petitioner did not have sufficient funds to pay the same; that petitioner had property of value in the State of Minnesota; that it had liabilities amounting to the sum of \$377,790.00 which it was unable to pay; that it had been



denied the right to do business in the States of Minnesota and Nebraska; that it was insolvent and that there was great danger of the property being wasted and dissipated by litigation ensuing and about to ensue upon a large number of unpaid claims owing; that various creditors were threatening to sue the company and collect their claims by attachment and other legal process unless the court should take the property of the company into its custody and appoint receivers for the purpose of converting its assets into money and distributing the same among its creditors; that the object of the action was to close up the business and to cause a fair and just distribution of its property among its creditors; that the property of petitioner asked to be taken control of by the court greatly exceeded in value the sum of \$3,000 exclusive of interest and costs, i. e., several hundred thousand dollars. (Transcript of Record, pp. 17-21.) The United States District Court for the District of Minnesota on May 2, 1921, made its order granting the prayer of the complaint, appointed receivers of all of the property of every kind and nature whether real, personal or mixed, whether in law or in equity, whether in action or possession, wheresoever situated of the Lion Bonding & Surety Company, and authorized the respondent herein to apply to any other district court for ancillary proceedings, and directed the receivers to take immediate possession of all of the property of the defendant and to institute and prosecute such suits as might in their judgment

be necessary for the proper protection of the property and trust vested in them and also to conduct the defense of any suits now pending for or against the defendant. (Transcript of Record, pp. 23-24.) The receivers promptly qualified and proceeded with the administration of the assets by collecting such as they could find and by interposing defenses to actions brought against the company. By the filing of certified copies of complaint and order appointing receivers, in compliance with the provisions of Section 56 of the Judicial Code, the jurisdiction of the receivers was extended into six other federal districts in the Eighth Judicial Circuit, including the District of Nebraska. Bills of complaint asking the appointment of the same receivers as ancillary receivers were presented in ten other federal districts and orders were made appointing the same receivers as ancillary receivers therein, so that of the nineteen states in which the company had been doing business, these receivers were appointed, qualified and began their duties as such in seventeen federal districts, in some of which the company had substantial property, though the bulk of the property was in Nebraska. The federal receivers sought diligently to obtain the possession of files, records and assets in the hands of Amo Thomas, Special Agent of the Nebraska Department, who, however, has continued in the possession of the Nebraska assets and has used in conducting the business and conserving the assets very considerable sums, in part set forth

in respondent's motion to advance this case on the docket of the court.

On or about May 14th, 1921, a petition was filed in the name of the Lion Bonding & Surety Company in the United States Circuit Court of Appeals for the Eighth Circuit, and an order to show cause issued why an order of disapproval, under Section 56 of the Judicial Code, of the order of the District Court of the United States for the District of Minnesota, appointing receivers of the property of said company, in so far as said order might be operative outside the District of Minnesota, should not be made. Although the petition was made in the name of the Lion Bonding and Surety Company, those appearing in support of the same when the petition was presented and argued were Amos Thomas, agent of the Department aforesaid, and his counsel, who now appears as counsel for petitioners in this court.

On or about May 14, 1921, the Lion Bonding and Surety Company made and filed two motions in the United States District Court in and for the District of Minnesota, Fourth Division, which court had heretofore appointed respondents as receivers of the insolvent corporation, one motion being for dismissal of the bill of complaint, and the other motion to discharge the receivers, both of said motions being upon substantially identical grounds as follows: (1) That the amount involved in the bill of complaint was not sufficient to give this court jurisdiction, being less than \$3,000: (2) that the complainant was not a judgment cred-

itor but a simple contract creditor; (3) that the suit was of a local nature and should have been brought in the State of Nebraska where the company was incorporated; (4) that the State Court of Douglas county, Nebraska, had already obtained jurisdiction of the property of the Lion Bonding and Surety Company and of the matters in controversy prior to the commencement of this present suit in the Minnesota jurisdiction. (Transcript of Record, 26-29.)

On May 16th, 1921, in the Nebraska State Court an order was sought and obtained by the Nebraska Department allowing Thomas, Special Agent, a salary of \$1,000.00 a month with a minimum fee of \$5,000.00. (Transcript of Record in Case No. 467, pp. 23-24.)

On May 20th, 1921, the Nebraska Department by a petition which recited that it believed there was real estate and other property in other jurisdictions than Nebraska, and it was necessary to bring an action in other jurisdictions in order to place the property in such other jurisdictions in the Department's control, secured on that day, May 20th, 1921, an order of the State Court authorizing and *directing it to commence an action to secure possession* and control of the assets, business and affairs of the company *in every jurisdiction* where assets of the company might be found, or where the company had been authorized to do business. Transcript of Record in Case No. 467, pp. 24-26. This order was carried out, if at all, in a very limited way, perhaps because bills of complaint to ex-

tend the jurisdiction of the Federal receivers heretofore appointed in Minnesota had promptly been filed in states in which the Lion Company had been doing business; and the Department now claims outside jurisdiction upon another theory.

Arguments first came on to be heard upon the motion for disapproval of the extra-territorial jurisdiction of the federal receivers. Hearing had been set for May 21st, but on account of the death of the late lamented Chief Justice White the hearing was continued until Monday, May 23rd, at which time, before three Judges sitting in the Circuit Court of Appeals the matter was fully presented by oral argument; on the part of the petitioner herein an extensive written brief was submitted covering the questions of (a) prior possession, (b) amount in controversy, and (c) suit of a local nature, which have at all times been urgently insisted upon. At the hearing the court asked searching questions as to the extent of the Nebraska proceeding, and whether or not it was a liquidation proceeding, and whether it had been instituted elsewhere than in Nebraska.

*Five days* later and *three days* before the aforesaid motion was decided by the Circuit Court of Appeals, but before arguments had been had in the United States District Court for the District of Minnesota, upon the motions to dismiss the bill of complaint and to discharge receivers hereinbefore referred to, a petition marked "supplemental petition," but in fact original in character, entirely distinct from the petition previously made by the

Department of Trade and Commerce of the State of Nebraska, was hastily filed by the Department in the District Court of Douglas County, Nebraska. This petition, which appears at pages 17 and 18 of the Transcript of Record in Case No. 467, recited the order of April 12, 1921, directing the Department of Trade and Commerce of the State of Nebraska to conduct the business of the defendant, that application for receivers had been made in Minnesota and elsewhere, and that a large number of suits had been instituted by various creditors, the total number of which suits was approximating 150, with a total alleged liability of \$500,000.00; and that the appointment of receivers in Minnesota and elsewhere had resulted in a demand for possession of the assets of the petitioner; that the conduct of the business of the petitioner had been so hampered as to prevent the Department from longer conducting the business of the corporation as a going concern; that the stockholders of the petitioner had failed to remove any deficiency of capital; that the capital and legal reserve of the company had become so impaired as to be hazardous to the policy-holders, creditors, stockholders and the public; that the petitioner was insolvent and that the conditions demanded that the business of the petitioner be liquidated, its assets marshalled and used for the purpose of distributing to those persons who might be properly entitled thereto; and an order was sought authorizing the winding up and liquidation of the company under the direction of the Department. This



petition was dated *May 28, 1921*, to which an answer was filed on the same day admitting the allegations contained in the complaint and joining in a prayer to the court that it grant the relief sought by the petitioner. The answer was signed "Lion Bonding & Surety Company, by Edward P. McDonald, Attorney for the Defendant." (Transcript of Record in Case No. 467, p. 19.) It is to be borne in mind that at the time of the filing of this petition and answer the Lion Bonding & Surety Company had been adjudged insolvent and that Federal receivers had theretofore been appointed on May 2, 1921, in the District of Minnesota, and on May 11, 1921, the territorial powers of the receivers had been extended to the District of Nebraska, subject to disapproval under the provisions of Section 56 of the Judicial Code, so that for more than two weeks prior to the filing of this petition the receivers had been the qualified and acting receivers of the Lion Bonding & Surety Company in the District of Nebraska, of which both the Department of Trade and Commerce and Edward P. McDonald, signing in behalf of the Lion Bonding and Surety Company, had full notice. The hearing in the United States District Court for the District of Minnesota upon the motions (1) to dismiss the complaint, and (2) to discharge the receivers were scheduled to be heard on May 30th, two days after the above petition was filed. Edward P. McDonald, who signed the answer to the so-called supplemental petition of the Department of Trade and Commerce against the Lion Bonding

& Surety Company, had for a long time prior there-  
to been in the employ of the Lion Bonding & Sure-  
ty Company and had continued in the employ of  
the Department of Trade and Commerce under the  
direction of Mr. Amos Thomas after the order of  
April 12, 1921, and was, so we understand, an em-  
ployee of the Department on May 28th, 1921, at  
the time he signed the alleged answer. The federal  
receivers and their counsel had no notice or knowl-  
edge of the filing of the so-called supplemental pe-  
tition nor of the fact that the alleged answer had  
been interposed consenting to the order prayed for  
in that petition, though full notice and knowledge  
was brought to the attention of the court in that  
proceeding of the appointment of receivers by the  
United States District Court for the District of  
Minnesota and of the qualification of said receiv-  
ers as ancillary receivers in Nebraska.

The motions before the United States District  
Court for the District of Minnesota to dismiss the  
bill of complaint and discharge the Federal re-  
ceivers were argued on May 30th, 1921, at which  
time the Circuit Court of Appeals had filed no or-  
der on the motions hereinbefore referred to to dis-  
approve the exercise by the Federal receivers of  
extra-territorial authority. The United States  
District Court denied both motions, rendering  
from the bench on that day the opinion which later  
was transcribed and filed. (Transcript of Record,  
pp. 105-107.)

It will be noted that all of the allegations con-  
tained in the bill of complaint of this respondent

in the United States District Court for the District of Minnesota were admitted by the Lion Bonding and Surety Company upon the filing of motion to dismiss and that no challenge or denial of its allegations was made at that time, nor has since been made; that petitioner sought only to dismiss the bill of complaint upon the grounds then specified and has never challenged the merits of the respondent's case.

On May 31st, 1921, the United States Circuit Court of Appeals made and filed its order denying the motion of the petitioners to disapprove the exercise by Federal Receivers of extra-territorial authority. A full copy of the order appears on pages 16 and 17 of Transcript of Record in Case No. 467.

No subsequent proceedings having been had before the District Court of Minnesota in any manner challenging the creditors' bill of complaint and no answer having been interposed thereto, on August 11, 1921, a final decree was entered in said action, adjudging the claim of the plaintiff, making permanent the receivership and enjoining the petitioner from in any manner interfering with the possession and control of the receivers over the property of the petitioner. (Transcript of Record, pp. 1-4.)

On October 31, 1921, the petitioner made and filed his petition for appeal, assignment of errors and bond on appeal, which were presented before the Honorable Wilbur F. Booth, United States District Judge for the District of Minnesota, and appeal allowed. (Transcript of Record, pp. 4-8.)

The case was submitted before the Circuit Court of Appeals of the Eighth Circuit at St. Paul, Minnesota, at the May term, 1922, and the decree of the lower court was affirmed. The opinion is recorded in Transcript of Record, page 15, and is based upon the reasons stated in Case No. 5902, C. C. A., which is reported in Vol. 280 Federal Reporter, page 532. (Transcript of Record, 109-117.)

#### STATEMENT OF CASE.

##### *Case No. 467.*

After the appointment on May 2, 1921, of federal receivers by the United States District Court for the District of Minnesota, their qualification, and the filing in the District of Nebraska and elsewhere of certified copies of the bill of complaint and order so appointing them, the federal receivers made frequent demand on the Department of Trade and Commerce of the State of Nebraska and its agent for possession of the assets of the Lion Bonding & Surety Company and from time to time from then on until September, 1921, demanded like possession of files and records deemed necessary by the receivers for the defense of law suits and the adjustment of controversies in districts in which the receivers were acting as such; possession was refused. Something of this situation is disclosed in an affidavit in Transcript of Record, pages 29-30.

On September 6th, 1921, the receivers filed a bill of complaint in the United States District Court

for the District of Nebraska, joining as defendants the petitioners herein and others and asked for an order and decree of the court adjudging the federal receivers to have priority of right and the exclusive right to the possession of all of the assets of the defendant Lion Bonding & Surety Company, its books and records and that the defendants have no right to their possession, and for an injunction. The complaint, after setting up the proceedings in the United States District Court for the District of Minnesota, resulting in the appointment of the respondents herein as receivers of the property and assets of the Lion Bonding and Surety Company and their qualification as such, set up certain of the proceedings which had taken place in the District Court of Douglas County, Nebraska, given hereinabove; recited that under Section 56 of the Judicial Code the United States Circuit Court of Appeals for the Eighth Circuit had denied the motion to disapprove the appointment of receivers in so far as the order of appointment had effect extra-territorially, and recited that the sole right of possession in the Nebraska Department was under the order of that court granting temporary possession for the *conduct of the business* of the company; and recited the later order in that court of May 28th, 1921, for liquidation. Exhibits of proceedings in the state and federal courts were filed and made a part of the complaint, also affidavits to sustain the allegations. (Transcript of Record, pp. 1-28.) On September 24, 1921, on motion for temporary injunction based upon the above bill

of complaint, and affidavits appearing in Transcript, pp. 28-30, the matter came on for hearing before the United States District Court for the District of Nebraska, on which day motions to dismiss said bill of complaint were served and filed by the Nebraska Department et al. and by Amos Thomas et al. Upon the hearing, on said September 24th, 1921, the court granted the motions to dismiss and denied the application for temporary injunction. (Transcript, p. 43.) From this order an appeal was prosecuted to the United States Circuit Court of Appeals, Eighth Circuit, which court reversed the lower court "with directions to the court below to set aside its order dismissing plaintiff's appeal, to reinstate the complaint and to issue an injunction in favor of the appellant and against the appellee restraining them and each of them from removing, secreting, or disposing of the moneys, books, papers, records, assets, property, accounts or choses in action, of or derived from the Lion Bonding and Surety Company and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division." (Transcript, p. 54.)

The present case is upon a writ of certiorari from the decree of the Circuit Court of Appeals as aforesaid.



NEBRASKA DEPARTMENT NOT STATUTORY SUCCESSOR OR LIQUIDATOR.

Using as a foundation for his theory, the case of *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, and a few kindred cases, counsel now contends that the Department of Trade and Commerce became statutory successor and liquidator of the Lion Bonding & Surety Company, and that its authority as such is entitled to be given full faith and credit in all states as a matter of right.

One answer to this is that at the time of the appointment of the Minnesota receivers the proceeding in Nebraska was not a liquidation proceeding; and while counsel now contends in his brief that the proceeding always contemplated liquidation, is it not conceivable that not until the argument of May 23rd, 1921, hereinabove referred to, was the same intended or resolved upon.

The Nebraska proceeding must be judged as of the time the conflict arose, as the United States Circuit Court of Appeals for the Eighth Circuit said in its order denying application for disapproval hereinabove set forth. This date was May 11th, 1921.

On said May 11, 1921, the date so set as determinative of the respective rights of the parties in Nebraska, the Department of Trade and Commerce was acting as appointee under an order of the court made pursuant to Subdivision 2 of Section 4 of Article III, Title 5, Laws of Nebraska, 1919, p. 579 et seq., which provided solely for a conduct

of the business of the company until the cause of the order for taking possession has been removed and the company could properly resume the possession of its property and the conduct of its business.

Again there had been no dissolution of the Lion Bonding and Surety Company, nor a statutory successor thereto, as there was in the case of *Relfe v. Rundle*, supra. The *Relfe* case and the *Converse* cases cited by counsel must be considered in the light of the peculiar statutes therein construed, and are readily distinguishable from the instant case. The *Converse* cases were cases in which the Minnesota statute gave authority to sue in foreign jurisdictions, and the right to do so thereunder was upheld.

The instant case bears more resemblance to the case of *McConnell v. Hubbard, et al.*, 272 Fed. 961, where under a Tennessee statute much like the Nebraska statute under discussion, the Court held that such statute does not vest the title in the superintendent of banks as receiver, nor make him a quasi-assignee, and that he cannot bring suit outside the jurisdiction of the court which appointed him. See also *Zacher v. Fidelity Trust & Safety Vault Company, et al.*, 106 Fed. 593; *Sterrett v. Second National Bank*, 246 Fed. 753.

LIQUIDATION PROCEEDING IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, EXCLUDES NEBRASKA STATE COURT PROCEEDING.

The jurisdiction taken by the Nebraska State Court was not such as to make it improper for the Federal Court, for the purpose of appointment of receivers and liquidation of the business of the Lion Bonding & Surety Company, to take jurisdiction. The purpose of the suit in Nebraska, as heretofore stated, was not to join under the control of the court the assets of the corporation to be administered for the benefit of all entitled to share in the fruits of the litigation, nor was that its legal effect, while those were the purposes and effect of the Minnesota suit.

We respectfully submit that the question turns upon the character of the two suits.

One was to conduct the business of the company, and turn it back to its owner. The Minnesota suit was to liquidate the business and distribute the assets.

Does counsel contend that the Department of Trade and Commerce of Nebraska could continue to hold the property of this insolvent company, and conduct its business, while in other states judgments are being entered, attachments and executions levied, to the prejudice of the company's general creditors? Can a State Department, because it is such, accomplish this unusual result? And are National Courts to deny creditors their

usual rights? Is a State Department to be permitted to shield a corporation admittedly insolvent, which has for a long time been indulging in unlawful practices, and whose assets are so diminished as to make it unlikely that any creditor will receive a sizable portion of his claim?

The case of *Morrill v. American Reserve Bond Company*, 151 Fed. 305, holds that a suit started in a state court to subject a state deposit to the payment of the claim of an individual does not place the deposit or any part of it in the custody of the state court or beyond the lawful jurisdiction and power of the Federal Court to take actual possession of it in a suit like that at bar, to wind up the affairs, liquidate the debts and distribute the assets to those who in law and equity are entitled to receive them. See also *Shields v. Coleman*, 157 U. S. 168; *Compton v. Jesup*, 68 Fed. 263. In general where suits to administer a fund are commenced, one in the state and one in the Federal court, the decisions are quite uniform, as in *Knudsen v. First Trust and Savings Bank*, 245 Fed., page 81, and *McClellan v. Garland*, 217 U. S. 268; 30 Sup. Ct. Rep. 501, that the pendency of an action in the state court is no bar to proceedings concerning the same matter in Federal court, and that where the matters in controversy are different and the parties different, the Federal court will retain jurisdiction of the proceedings instituted therein notwithstanding prior institution of a suit in the state court.

As is said in *Morrill v. American Reserve Bond Company*, supra, 151 Fed. 205, at p. 313: "Is the jurisdiction of the Federal court sitting in equity to enforce this trust and to liquidate the affairs of these insolvent corporations thus limited by the statutes of the State of Missouri? A Federal court sitting in equity has the plenary jurisdiction of the English Court of Chancery, and one of the inherent powers of each court is to take and hold by its own hands, by its receivers, the control and the possession of \* \* \* property during the pendency of suits concerning it in those courts, whenever in the exercise of a wise, judicial discretion these courts are of the opinion that the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action. The statutes of the State of Missouri do not by their terms, and the Legislature of that state never intended that they should in any way limit or impair this power of the Federal courts. Moreover, the power of the Circuit Courts of the United States to adjudicate claims and administer remedies in equity, as it was not granted by, it may not be revoked, impaired, or limited by the Act of any State. Wherever citizens of different states lawfully invoke the jurisdiction of the Federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent

judgments of those courts; and no state by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and in the exercise of their judicial discretion to control the possession of its subject matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments."

As said in *Hyde v. Stone*, 20 Howard, 170, 175 (15 L. Ed. 874), quoted in *Welch v. Union Casualty Company*, 238 Fed. 968, at p. 977: "But this Court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts. \* \* \* But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

And in *Welch v. Union Casualty Company*, 238 Federal, on page 978:



"There is no peculiar advantage to the stockholders or to the creditors pointed out through having the property turned over for administration by the state receiver, and in view of the business of the corporation having been transacted in several states, the ancillary receivership of the Federal court in the State of Ohio, and the probable necessity for ancillary proceedings in other federal districts, where assets are situate, the case seems to be one which peculiarly comes within the advantages of Federal jurisdiction."

Our position, in brief, is that the suit in the Nebraska state court, being one to conduct the business of the company, did not require for the accomplishment of its purpose the possession of the property, and if it had such possession, that fact would not control, in view of the fact that the suit did not seek or contemplate a change in the title of the property, as did the Minnesota suit; that while it is difficult to reconcile the language of many of the cases on this point, the true theory is that only when a suit contemplates a change in title of the property is jurisdiction acquired such as will exclude all other courts.

The rule as to conflicting liquidation proceedings and their priorities would not apply to a proceeding begun for a temporary purpose, that does not affect the *title* to property or seek a change therein. Many cases have not taken cognizance of the logical and important distinction between proceedings such as seek a transfer of title to the property and other proceedings; and the determin-

ation of the important question arising from different appointments of the courts in concurrent jurisdictions has erroneously been made to depend on the test of primacy rather than on the true test, which takes into account the character of the proceedings. As was stated by Justice Miller in a very early case, *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257: "But it is not true that a court having obtained jurisdiction of a subject matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court; \* \* \* in examining into the exclusive character of the jurisdiction of such cases we must have regard to the nature of the remedies, the character of the relief sought."

As said in an interesting discussion of the subject in *Pomeroy's Equity Jurisprudence*, Fourth Edition, Volume 4, Section 1591, page 3748:

"Where the first proceeding is not in rem in its nature and the effect of the proceeding will not be to disturb the *title* of the res, a receiver may be appointed of the entire property notwithstanding the pendency of a prior proceeding. For example, a receiver is sought to manage the affairs of an insolvent corporation until such time as the corporation itself can pay its debts and assume the management of its property; there is no reason why a receiver should not be appointed in proceedings, which though subsequently begun, have as their object the final disposition of the property."

It is our further contention under the rule laid down and followed in practice in a case, phases of which are reported in 206 Fed. 772, 209 Fed. 300, 217 Fed. 187, 242 Fed. 658, known as the Kansas Natural Gas litigation, wherein the point is made and carried out in practice in two proceedings in which different relief is sought, that one court may hold the assets until it accomplishes the purpose of the proceeding therein brought, and thereafter turn the property over to the conflicting proceeding so that it may accomplish the purpose for which it was brought. Applying this rule to the instant case, when the Federal receivers were appointed, the Nebraska proceeding was merely one to *conduct the business* and turn it back to its owner, and if that proceeding had not, at the time of the appointment of the Federal receivers, accomplished the purpose for which it was brought, that purpose had certainly been accomplished and the function of the Nebraska Department under its appointment of April 12, 1921, had been wrought on May 28, 1921, when the Nebraska Court was asked to appoint the said Department an agent for the purpose for which the Federal receivers had already been appointed, i. e., that of liquidation, and that accordingly the Federal receivers had constructive possession of the Nebraska assets of the defendant company, if not at the time of their appointment on May 11, 1921, or when they qualified in Nebraska, on May 11th, 1921, then certainly on May 28th, 1921.

It should be noted that the original proceeding in the District Court of Douglas County, Nebraska, brought pursuant to Chapter 190, Laws of Nebraska, 1919, was brought pursuant to a section thereof which provided that upon application of the Department of Trade and Commerce the court might direct the Department to take possession of the property and *conduct the business* of an insurance company, and that the later proceeding in the State Court, hurriedly commenced on May 28, 1921, while marked "Supplemental" to the original proceeding, was, in fact, not that, but an independent action, brought to liquidate the business under a different paragraph of the statute aforesaid, and that under well recognized principles of law it could not be in aid of and part of the original proceeding, but must have been, and was, an entirely independent proceeding.

As is said in the case of *Shields v. Coleman*, 157 U. S. 168, at page 178:

"The mere fact that in the progress of an attachment or other like action an exigency may arise which calls for the appointment of a receiver does not make the jurisdiction of the court in that respect relate back to the commencement of the action."

And on page 179 of the same report:

"It is true that the court had the power to enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill, so as to invalidate action taken by other courts in the meantime."

If the Minnesota proceeding for liquidation of the business of the Lion Bonding & Surety Company had not been commenced, the Nebraska Department might still be conducting the business of this admittedly insolvent concern, and might, if the principle for which we contend is not sound, continue to conduct the business until all of the property of the company is gone.

#### SIMPLE CONTRACT CREDITOR.

The statement of counsel that a federal equity court whose claim has not been reduced to judgment, to appoint a receiver for property upon which he asserts no specific lien by way of mortgage or pledge, and in which he asserts no special property right or interest in equity as a stockholder in a corporation or otherwise recalls the language of Judge Noyes of the Second Circuit, in *Pa. Steel Co. v. N. Y. City Ry. Co.*, 198 Fed., on page 737, where he says:

"Thus is illustrated anew the vainness of saying what courts of equity cannot do."

We believe the rule above contended for might have been urged with force ten or fifteen years ago, but that at the present time such requirements are not insisted upon.

And there have grown up exceptions to the rule, as to who may initiate a receivership proceeding, as well recognized as the rule itself. One such exception is in the case of insolvency, and this exception to the rule and others are noted in a number

of cases of which that of *Williams v. Adler Company*, 227 Fed. 374, is typical.

As said in *Case v. Beauregard*, 101 U. S. 688:

"Neither law nor equity requires a meaningless form, '*Bona sed impossibilia not cogit lex.*'"

A SUIT TO COLLECT AND ADMINISTER ASSETS WHICH  
DOES NOT SEEK TO DISSOLVE CORPORATION  
OR INTERFERE WITH INTERNAL  
MANAGEMENT IS NOT A SUIT  
OF A LOCAL NATURE.

The contention is made, that, as Minnesota is not the domicile of the Lion Bonding & Surety Company, the Federal court has no jurisdiction. Though we need not quarrel with the proposition that the state alone has the power to dissolve its creature, yet as stated in *Dopper v. Supreme Council*, 70 N. Y. Supp. 637: "There is a manifest distinction between the receiver of property of the corporation and the receiver of the corporation." The suit in Minnesota is also to be distinguished from a stockholders' suit which seeks to affect the internal management of a company, a matter perhaps more properly one for the courts of domicile.

That a court of equity, however, has jurisdiction in a proper suit at the instance of a creditor to appoint a receiver and distribute assets in accordance with the equitable rights of the parties cannot be gainsaid. While the liquidation of the



business of the corporation leaves the corporate entity an empty shell, yet it must be conceded that a court of a state in which a corporation is doing business, and in which it has property, may appoint a receiver, and that a fortiori the Federal court may do so.

- Lowe v. R. P. K. Pressed Metal Company, 91 Conn. 91, 99 Atl. 1;  
 Atwater v. Baskerville, 106 Atl. 369;  
 Albert v. Clarendon, 53 N. J. Equity, 633, 23 Atl. 8;  
 Horton v. Thos. McNally, 140 N. Y. S. 357;  
 Patton v. Accessory Transit Company, 4 Abbott Practice, 139;  
 De Bemmer v. Drew, 39 Howard's Practice, 499.

The appointment of receivers is so largely a matter of discretion that especially in an action of the character of that in Minnesota, there would seem to be no question of the right to appoint, as a protection to the citizens of that state who were creditors of the Lion Bonding & Surety Company.

#### AMOUNT IN CONTROVERSY.

We respectfully submit that when a bill in equity brings under the direct control of the court all the property and estate of defendant to be administered for the benefits of all entitled to share in the fruits of the litigation, the possession of the property being necessary to the granting of the relief sought, the logical and accepted view now is

that so far as the jurisdiction of the Federal court is concerned, the value of the assets of the corporation determines the amount in controversy; that in a receivership, the corpus of the property being brought into the hands of the court for administration, is the amount with which the court deals, i. e., the amount in controversy.

Towle v. Society, 60 Fed. 131;

Taylor v. Decatur Land Company, 112 Fed. 449;

Jones v. Mutual Fidelity Company, 123 Fed. 506;

Putnam v. Timothy Dry Goods Company, 79 Fed. 454;

Kent v. Honsinger, 167 Fed. 619.

Also there are analogous cases, such as L. & N. R. R. Co. v. Smith, 128 Fed. 1, which hold that the value of the right sought to be protected and not alone the amount tendered by the complaint in court is the amount in controversy, and such cases as Dill et al. v. Supreme Lodge, Knights of Honor, 226 Fed. 807; Cummings v. Supreme Council, 247 Fed. 992, which hold that where, as in the instant case, one sues in behalf of himself and all others similarly situated, the amount in controversy is the aggregate interest of the whole class.

## SECTION 56 OF THE JUDICIAL CODE.

Some point is made as to the effect of Section 56 of the Judicial Code, which doubtless meant to cover a case of this character.

However, on the motion heard before the Circuit Court of Appeals of the Eighth Circuit on May 23rd, 1921, to disapprove, under Section 56 of the Judicial Code, the report of the condition and property of the Lion Bonding & Surety Company made by the Insurance Departments of six states, (Transcript of Record, pp. 34-77), was before the Court, and it appeared therefrom that the Lion Bonding & Surety Company had real estate in Utah, Wyoming and Nebraska, where certified copies of bill and order appointing receivers had been filed, and that there was substantial property in the other three districts wherein certified copies were filed in compliance with said statute.

## SUIT NOT AGAINST STATE.

It is submitted that a suit to enjoin or direct a state officer in performance of an official act which requires the exercise of no discretion and involves no pecuniary interest of the state and no violation of a positive statute thereof, indicative of its public policy, is not a suit against the state and that any qualified citizen of another state may maintain such a suit in a Federal court. We believe this principle so firmly established as to call for no further comment. The case of *Morrill v. American*

Reserve Bond Company, 151 Fed. 305, is illustrative of the class of cases which so hold.

FEDERAL COURT MAY PROTECT ITS OWN JURISDICTION,  
NOTWITHSTANDING SECTION 265 OF  
THE JUDICIAL CODE.

Under Section 265 of the Judicial Code, the Federal court has power to protect its own jurisdiction where it has acquired such in a suit which affects the title to property, such as a liquidation proceeding, in such a suit as invokes the rule that it excludes all other proceedings. As was stated in *Western Union Telegraph Company v. United States*, 221 Fed. 545, at p. 535: "The court which first lawfully acquired dominion over and the power to dispose of specific property \* \* \* may by injunction protect the property, its decree and the title under that decree from suits or other proceedings in other courts."

As stated by Mr. Justice Sutherland in *Kline v. Burke Construction Co.*, Vol. 54, Sup. Ct., p. 79, at p. 81: "But this section, Sec. 265 of the Judicial Code) is to be construed in connection with Section 262 (Comp. Stat. 1239), which authorizes the United States 'to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.'" See *Julian v. Central Trust Company*, 193 U. S. 93, 112; 34 Sup. Ct. 379, 48 L. Ed. 629; *Lanning v. Osborne*, 79 Fed. 657, 662.

Pursuant to the direction of the United States Circuit Court of Appeals, appearing in its opinion (Transcript of Record in Case 467, p. 56), application was made to the United States District Court for the District of Nebraska to set aside its order dismissing the plaintiff's bill, to re-instate such bill, and to issue an injunction as directed in said opinion. The injunction was issued and later made permanent.

It is submitted that the conclusions reached by the United States Circuit Court of Appeals for the Eighth Circuit in both Cases 574 and 467 should be sustained.

Respectfully submitted,

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondents.

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

No. 467.

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DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF  
NEBRASKA; AMOS THOMAS, PERSONALLY AND AS AGENT  
AND REPRESENTATIVE OF THE DEPARTMENT OF TRADE AND  
COMMERCE OF THE STATE OF NEBRASKA; W. B. YOUNG,  
J. E. HART, H. C. LEIGH, E. P. McDONALD, DAN F.  
BROWN, F. P. COWDREY, R. A. MACKAY, AND W. A.  
ROBINSON,

*Petitioners,*

vs.

A. J. HERTZ AND JOHN I. LEVIN, AS RECEIVERS OF THE LION  
BONDING & SURETY COMPANY,

*Respondents.*

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**BRIEF OF RESPONDENTS.**

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BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondents.

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**BRIEF OF RESPONDENTS.**

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*To the Supreme Court of the United States:*

On May 2nd, 1921, the respondent filed his complaint in equity in the District Court of the United States for the District of Minnesota, in behalf of himself and all other parties similarly situated who should desire to make themselves parties, against the petitioner. The substance of the complaint is recited at the outset of the opinion of the Circuit Court of Appeals for the Eighth Circuit in Lion

Bonding and Surety Company against Karatz, reported at 280 Federal, page 532, and appearing in the Advance Sheet of the Federal Reporter of August 24th, 1922. An order was made by Honorable Wilbur F. Booth on May 2nd, 1921, appointing receivers of all the property and assets of the Lion Bonding and Surety Company wherever situated.

Within ten days after said date and pursuant to Section 56 of the Judicial Code, Volume 1, Compiled Statutes 1916, page 1164, Section 1038, respondent caused a certified copy of bill and order so appointing receivers in Minnesota to be filed in six Federal districts of the Eighth Judicial Circuit, of which the District of Nebraska was one. Respondent also caused bills of complaint to be filed in nine other federal districts, and the same receivers were appointed in each of said districts as ancillary receivers. Thus the receivers first appointed in Minnesota became qualified and are acting as such in sixteen federal districts, in some of which the company had substantial property, though the bulk of the property of the company was in Nebraska. The company had been doing business in nineteen states.

As appears at page 88 of the Transcript in Case 5902 in the Circuit Court of Appeals for the Eighth Circuit a number of judgments had been entered in Minnesota against the company. The suit of respondent sought a liquidation of the business of the company and a protection equally for its creditors. Before the Minnesota proceeding was commenced the insolvent and deplorable condition of the Lion Company, through a joint report made by several insurance commissioners, which was on file with the Insurance Commissioner of Minnesota, and the

fact that no receiver had been appointed, or liquidation sought in Nebraska, were matters of current knowledge.

On April 12, 1921, in Douglas county, Nebraska, a proceeding had been started pursuant to Laws of Nebraska, 1919, Paragraph 2 of Section 4, Article III of the Act, upon the petition of the Department of Trade and Commerce of the State of Nebraska. Though the company was hopelessly insolvent, had been indulging in unlawful practices, and its capital and surplus were entirely dissipated, the Department had been granted leave to *conduct the business* of the company until it should appear proper for the officers of the company to resume possession of its property and the conduct of its business; and one Amos Thomas, as Special Agent of the Department, was proceeding to conduct the business, at a salary of \$1,000 a month, and despite the efforts of the receivers appointed in Minnesota, to obtain the possession of files, records and property in his hands, Thomas has continued in possession of the Nebraska assets of the company, which constituted the bulk of its property, and used from April 12th, 1921, to December 31st, 1921, as we understand, approximately \$100,000.00 in the attempt to conduct the business and conserve the assets, which may not constitute as much as \$500,000.00 in value. Under the circumstances, it would seem that the plan to conduct the business was a protection to officers of the company but not to creditors.

On May 23rd, 1921, in an argument in the Circuit Court of Appeals for the Eighth Circuit upon counsel's application for disapproval of the exercise by the receivers of extraterritorial authority, pursuant to their qualifications under Section 56 of the Judicial Code, counsel for petitioner herein was asked searching questions as to the char-

acter and extent of his Nebraska proceeding. Counsel, returning to Nebraska, *five days* after that hearing, and *on May 28th, 1921*, still *three days* before the Circuit Court of Appeals rendered its decision on his application aforesaid, made application now in behalf of the Nebraska Department of Trade & Commerce, although in the argument before the Circuit Court of Appeals for the Eighth Circuit he had appeared for the Lion Bonding and Surety Company, for an order in Douglas county, Nebraska, for liquidation of the Lion Company, and an order therefor was granted. Three days later, *on May 31st, 1921*, the Circuit Court of Appeals filed its order denying the application to disapprove the extraterritorial authority of the Minnesota receivers. The order was qualified by the statement that the right of the Minnesota receivers to possession of Nebraska property was subject to *such* right of possession as the Nebraska Department of Trade and Commerce had, and said, following the usual rule in comity, that the order was without prejudice to the right of the receivers to apply to the state court for the Nebraska property. It appeared to the receivers appointed in Minnesota that the Nebraska State Court, by its action on May 28th, 1921, had pre-judged any application they might make under the rule in comity. Conceiving then that their proper course to be to apply in the forum of their election for possession of the property as against the Department of Trade and Commerce, the receivers brought suit on September 6th, 1921, in the United States District Court for the District of Nebraska at Omaha, to obtain a determination of the question of prior right to possession and asked for an injunction against the Department of Trade and Commerce and other defendants named. On

September 24th, 1921, upon the hearing, the bill of complaint was on motion dismissed, and the injunction denied by Judge Woodrough. On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, a decision was on April 28th, 1922, rendered, which now appears in Volume 280 of the Federal Reporter at page 540, and is reported in the August 24th, 1922, Advance Sheet of the Federal Reporter, reversing the order of Judge Woodrough, and holding that the receivers appointed in the United States District Court for the District of Minnesota have exclusive right to the possession of all the assets of the Lion Bonding and Surety Company, because the proceeding in Nebraska was for a temporary purpose only, not involving the title of the property of the insurance company. In the same Federal Reporter at page 532 is a decision in Lion Bonding and Surety Company against Karatz, which affirms the decision of Judge Booth retaining jurisdiction of the Minnesota receivership and denying defendant's motion to dismiss and vacate the appointment of the receivers. This opinion, we think, passed upon the questions which were raised by counsel in the case entitled in the Circuit Court of Appeals for the Eighth Circuit, Number 6007, wherein counsel petitions for a writ.

On page 3 of counsel's brief and elsewhere, are references to the proceeding in Nebraska, as being "the initiation of liquidation and administration proceedings," "that the court had undertaken to direct its liquidation" and of "due and regular proceedings for the purpose of conservation and liquidation." When the receivers were appointed in Minnesota, the only Nebraska proceeding was one "to conduct the business". We think the brief statement given—detailing just how and when, in the Nebraska

State Court, liquidation proceedings were hurriedly sought 26 days after the appointment in Minnesota—speaks for itself.

After the decisions of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on April 28th, 1922, and now reported as aforesaid, respondents applied, in June 1922, to Honorable J. W. Woodrough, United States District Judge for the District of Nebraska, for an injunction to restrain the Department of Trade and Commerce and its representatives from removing, secreting and disposing of the property of the Lion Company in their hands, or from doing any other action in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division, Judge Woodrough granted the injunction. Upon the date of hearing thereon, counsel appeared before Judge Woodrough with an order of a Judge of the Nebraska State Court, of which he now makes much, and to which he refers in Case No. 467 in his petition and brief therein on page 31. This order gives expression to a view of the case entertained by counsel. On July 7, 1922, upon final hearing of the case of Hertz, et al., vs. Lion Bonding and Surety Company, et al., before Judge Woodrough, Amos Thomas, personally and as Agent of the Department of Trade and Commerce, admitted, as we understood his testimony, that the Federal injunction had not been obeyed.

We believe that national courts are not to be denied their right to proceed in equity, to appoint a receiver, determine a corporation's solvency and distribute its assets, and that no State Statute or proceeding to conduct business thereunder can impair or destroy that power.



## ARGUMENT.

1. As a foundation for his theory, that of local or state control, the case of *Relfe v. Rundle*, 103 U. S. 222, and a few kindred cases, readily distinguishable from the case at bar and to be construed in the light of their peculiar statutes, are cited by counsel.

In the case at bar the Nebraska Department when Receivers were appointed in Minnesota was neither statutory successor or liquidator of the Lion Company, and no attempt had been made to liquidate or dissolve. The instant case is more in line with *O'Connell vs. Hubbard*, 272 Fed. 961, where under a somewhat similar statute the Court holds that title is not vested in the state officer, nor is he a quasi assignee, and that he cannot bring suit outside the jurisdiction of the court that appointed him.

2. The Nebraska proceeding, judged as of May 2nd, 1921, when Receivers were appointed in Minnesota, or as of May 11th, 1921, when a certified copy of the bill and order appointing receivers was filed with the Clerk of the United States District Court for the District of Nebraska, was a proceeding "to conduct the business" only. The rule as to conflicting liquidation proceedings and their priorities would not apply to a proceeding begun for a temporary purpose, that does not affect the *title* to property or seek a change therein. As said in *Pomeroy's Equity Jurisprudence*, Fourth Addition, Volume 4, Section 1591, page 3748, "Where the first proceeding is not in rem in its nature and the effect of the proceeding will not be to disturb the title of the res, a receiver may be appointed

of the entire property notwithstanding the pendency of a prior proceeding. For example, a receiver is sought to manage the affairs of the insolvent corporation until such time as the corporation itself can pay its debts and assume the management of its property; there is no reason why a receiver should not be appointed in proceedings, which though subsequently begun, have as their object the final disposition of the property."

Many cases have not taken cognizance of the logical and important distinction between proceedings such as seek a transfer and title to the property and other proceedings; and the determination of the important question arising from different appointments of the courts in concurrent jurisdictions has erroneously been made to depend on the test of primacy rather than on the true test which takes into account the character of proceedings.

As was stated by Justice Miller in a very early case, *Buck v. Colbath*, 3 Wall, 334, 18 L. Ed. 257: "It is not true that a court having obtained jurisdiction of the subject matter of a suit and of parties before it, thereby excludes all other courts from the right of adjudicating upon other matters having a very close connection with those before the first court; in examining into the exclusive character of the jurisdiction of such cases we must have regard to the nature of the remedies, and the character of the relief sought." If the Minnesota proceeding for liquidation of the business of Lion Bonding & Surety Company had not been commenced, the Nebraska Department might still be conducting the business of this admittedly insolvent concern.

Another contention of appellants is based upon the rule laid down and followed in practice in a case, phases of

which are reported in 206 Fed. 772, 209 Fed. 300, 217 Fed. 187, 242 Fed. 658, known as the Kansas Natural Gas litigation, the opinion in 217 Fed. 187, having been written by his Honor Judge Hook, wherein the point is made that in two proceedings in which different relief is sought and in which there are conflicting receiverships one court may hold the assets until it accomplishes the purpose of the proceeding brought therein, and thereafter turn the property over to the conflicting receivership so that it may accomplish the purpose for which it was brought. Applying this rule to the instant case, when the Federal receivers were appointed, the Nebraska proceeding was merely one to conduct the business and turn it back to its owner, and if that proceeding had not, at the time of the appointment of the Federal receivers, accomplished the purpose for which it was brought, that purpose certainly had been accomplished and the function of the Nebraska Department of Trade and Commerce under its appointment of April 12th, 1921, had been wrought on May 28th, 1921, when the Nebraska Court was asked to appoint the said Department an agent for the purpose for which the Federal receivers had already been appointed, i. e., that of liquidation. Accordingly, the Federal receivers had constructive possession of the Nebraska assets of the defendant company, if not at the time of their appointment, certainly on May 28th, 1921.

It must also be borne in mind that the original proceeding in the District Court of Douglas County, Nebraska, which was one brought pursuant to Chapter 190, Section 3147, Laws of Nebraska, 1919, was brought pursuant to paragraph two of said section, which provided that upon application of the Department of Trade and Commerce the

court might direct the Department to take possession of the property and conduct the business of an insurance company, and that the later proceeding, commenced on May 28th, 1921, while marked "Supplemental" to the original proceeding was in fact, not that, but an independent action, brought to liquidate the business under a different paragraph of the statute aforesaid, namely paragraph three thereof, and that under well recognized principles of law it could not be in aid of and as a part of the original proceeding, but must have been, and was independent and self-operating. From all of the above it follows, that at latest when the original Nebraska proceeding was abandoned, after the argument before the Circuit Court of Appeals on May 23rd, 1921, and the right to receivership and liquidation was on May 28th, recognized by the Nebraska Department, that the property of the company in Nebraska passed from the possession of the Nebraska Department to the Federal receivers, who were appointed on May 2nd, 1921, and who qualified in Nebraska on May 11th, 1921.

And as is said in the case of *Shields v. Coleman*, 157 U. S. 168, at page 178:

"The mere fact that in the progress of an attachment or other like action an exigency may arise which calls for the appointment of a receiver does not make the jurisdiction of the court in that respect relate back to the commencement of the action."

And on page 179 of the same report:

"It is true that the court had the power to enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill, so as to invalidate action taken by other courts in the meantime."

3. A single question is presented in the case of Ward vs. Foulkrod, 264 Fed. 634. In answering the question, on which his Associate Circuit Judge Buffington writes a very brief opinion, Circuit Judge Wooley seeks to classify decisions growing out of conflicting appointments, and to formulate a course of procedure. In the case under consideration both appointments were of receivers to continue the business.

Counsel quotes from this case a sentence therein, clearly obiter, which occurs immediately below another expression in which we feel confident this Court would not concur. Judge Wooley says, "It is elementary that the state which creates a corporation alone has the power to wind up its affairs and dissolve it." Yes, dissolve it, perhaps, but not wind up its affairs. Surely a Federal court can appoint a receiver and distribute assets in accordance with the equitable rights of the parties, though a suit to dissolve the corporate entity or a stockholder's suit affecting the internal management may be more properly cognizable in the Courts of domicile.

In the O'Neil case, 245 Fed. 261, Circuit Judge Wooley again rendering the opinion, the Court has before it a suit in which the Insurance Commissioner of Pennsylvania had commenced a proceeding to *liquidate* an insurance company. One day before the return day therein, a stockholder brought suit seeking conservation of the company property, and the defendant consenting, a receiver was appointed. The next day liquidation was ordered in the first proceeding. The Court holds *the first liquidation proceeding*, entitled to hold the receivership. We seek the same result in the instant case, that the Minnesota proceeding—the first brought for liquidation—be upheld.

There is no "inescapable conflict" here.

4. As to the amount in controversy, when a bill in equity brings under the direct control of the court all of the property and estate of defendant to be administered for the benefit of all entitled to share in the fruits of the litigation, the possession of the property being necessary to the granting of the relief sought, the value of the assets of the corporation—the corpus of the property brought into the hands of the court for administration—is the amount in controversy.

*Towle v. Society*, 60 Fed. 131;

*Taylor v. Decatur Land Company*, 112 Fed. 449;

*Jones v. Mutual Fidelity Company*, 123 Fed. 506;

*Putnam v. Timothy Dry Goods Company*, 79 Fed. 454;

*Kent v. Housinger*, 167 Fed. 619.

Also cases such as

*Dill, et al., v. Supreme Lodge, Knights of Honor*, 226 Fed. 807; and

*Cummings v. Supreme Council*, 247 Fed. 992,

hold that where one sues on behalf of himself and others similarly situated the amount in controversy is the interest of the class.

5. Equity does not require the doing of a vain thing. We submit that the rule that a simple contract creditor is not entitled to equitable relief until he has first reduced his claim to judgment and exhausted his remedy at law has exceptions to it, as well recognized as the rule itself.

*Williams v. Adler-Goldman Comm.*, 227 Fed. 374, 142

C. C. A., page 770 (8th Ct.)

Affirming (D. C.) 211 Fed. 530.

As said in *Case v. Beauregard*, 101 U. S. 688, "Neither law nor equity require a meaningless form. \* \* \* It



has been decided that where it appears by the bill that the debtor is insolvent and that an issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite for equitable interference."

6. It is well settled that a Federal Court notwithstanding Section 265 of the Judicial Code of the United States has power to protect its own jurisdiction and to render its judgments and decrees effectual.

*Dietsch v. Huidekoper*, 103 U. S. 494;

*Julian v. Central Trust Co.*, 193 U. S. 93;

*Looney v. Eastern Texas R. Co.*, 247 U. S. 214.

Respondent prays that this court deny the petition for a writ of certiorari.

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondents.

NOV 20 1922

WM. R. STANSBURY

CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

Case No. 574.

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LION BONDING AND SURETY COMPANY,  
*Petitioner,*

vs.

A. H. KARATZ,  
*Respondent.*

---

MOTION TO ADVANCE.

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondent.

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IN THE  
SUPREME COURT OF THE UNITED STATES.

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LION BONDING AND SURETY COMPANY,

*Petitioner,*

vs.

A. H. KARATZ,

*Respondent.*

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MOTION TO ADVANCE.

*To the Supreme Court of the United States:*

The undersigned petition this Honorable Court that the above entitled case, in which a writ of certiorari has been granted, be advanced upon the docket of the Court, so that there may be an early hearing and determination thereof.

## BRIEF STATEMENT OF THE MATTER INVOLVED.

A statement of this litigation is given in the brief of respondents in answer to the petition for writ of certiorari. A conflict exists between a federal proceeding, commenced in the District of Minnesota, wherein receivers were appointed and are acting and a Nebraska state court proceeding. The federal proceeding was brought to liquidate the business of the company; the first Nebraska proceeding was to conduct the business of the company.

On May 2nd, 1921, Honorable Wilbur F. Booth, United States District Judge for the District of Minnesota, appointed receivers of all property and assets of the Lion Bonding and Surety Company. The receivers so appointed are qualified as such in fifteen federal districts by virtue of compliance with Section 56 of the Judicial Code and by ancillary appointments. The Lion Company had been doing business in nineteen states.

A statutory proceeding to conduct the business of the same company was brought in the District Court of Douglas County, Nebraska, on April 28th, 1921. A petition to liquidate that business was filed in the same court on May 28th, 1921.

Two motions before Judge Booth, one to have the bill of complaint dismissed in the suit wherein federal receivers were appointed, another to discharge the federal receivers, were denied. A motion before the United States Circuit Court of Appeals for the Eighth Judicial Circuit to disapprove the exercise by the Federal Receivers of extra-territorial authority was denied. The order of Judge

Booth in retaining jurisdiction has been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, 280 Fed. 532. In 280 Fed. 540, the Circuit Court of Appeals for the Eighth Circuit directed that an injunction be granted requiring the Department of Trade and Commerce of Nebraska, the petitioner in the Nebraska proceeding, and its representatives, to hold in custody the company assets in Nebraska, and to take no action in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division. Thereafter Judge Booth directed the federal receivers to apply to Federal Judge Woodrough of Omaha, Nebraska, for an order directing the Nebraska Department, and its representatives, to apply to the District Court of Douglas County, Nebraska, for authority to deliver to the federal receivers all property of the Lion Company in their possession. Judge Woodrough upon the hearing at first said that he would make such order; later he denied the application upon the ground, as we understand it, that an appeal to the United States Supreme Court from his order granting final injunction against the Nebraska Department was about to be taken to the United States Supreme Court.

## REASONS FOR THE APPLICATION.

The undersigned respectfully state as reasons for their application to advance this case upon the docket of the court so that an early hearing and determination may be had,

1. That this case presents a conflict between federal and state courts with attendant embarrassments; that the interests of justice and of creditors will be greatly promoted and equity more nearly done by an early hearing and determination.

2. That the Nebraska assets of the Lion Bonding and Surety Company are being wasted and dissipated and that unless an early hearing and determination is had there will be no funds, or little, if any, funds for distribution among general creditors.

That in October, 1922, the undersigned examined the files in the Douglas County, Nebraska, proceeding, hereinabove referred to, and found *no report* of the condition or operation of the company *since a report of December 31st, 1921*; that a report of the agent of the Nebraska Department as of December 31st, 1921, showed assets in the sum of Four Hundred Sixty-nine Thousand Eighty and 14/100 (\$469,080.14) Dollars, of which approximately Two Hundred Thousand (\$200,000.00) Dollars was in first farm mortgages and certificates of deposit in the hands of the Nebraska Department of Trade and Commerce; that the report shows salaries paid from May 28th, 1921, to December 31st, 1921, of Thirty-seven Thousand



Six Hundred Forty-six and 87/100 (\$37,646.87) Dollars, of legal expenses paid Eight Thousand Two Hundred Seventy-seven and 56/100 (\$8,277.56) Dollars. The files show an order of May 16th, 1921, eighteen days after the commencement of the Douglas County proceeding to conduct the business, and twelve days before the petition for liquidation was filed in the Nebraska state court, allowing Amos Thomas, Special Agent of the Nebraska Department a salary of One Thousand (\$1,000.00) Dollars a month for his services, with a minimum fee of Five Thousand (\$5,000.00) Dollars. On May 15th, 1922, the Douglas County, Nebraska, court ordered payment of a Five Thousand (\$5,000.00) Dollar fee to Mr. Halleck F. Rose, Attorney for the Special Agent, to whom a fee of Fifteen Hundred (\$1,500.00) Dollars had previously been paid. On May 17th, 1922, another Omaha attorney was allowed a fee of Thirty-five Hundred (\$3500.00) Dollars. On September 27th, 1922, Mr. Thomas, as Agent, petitioned the Douglas County Court and stated that expenses of payroll due October 1st, 1922, would amount to approximately One Thousand (\$1,000.00) Dollars, that the expenses of a trip to Washington in this litigation, together with payroll due October 15th, 1922, would amount to approximately Three Thousand (\$3,000.00) Dollars, and asked that from the Two Hundred Thousand (\$200,000.00) Dollars in first farm mortgages and certificates of deposit in the hands of the Department of Trade and Commerce that he be permitted to cash certificates of deposit to pay the above expenses; an order was granted permitting him so to do; that this would seem to indicate that much, if not all, of the assets hereinabove referred to over and above the Two Hundred Thousand (\$200,000.00) Dollars in first

farm mortgages and certificates of deposit, may have been expended by the Nebraska Department and its representatives; that of the Two Hundred Thousand (\$200,000.00) Dollars in first farm mortgages and certificates of deposit approximately One Hundred Thousand (\$100,000.00) Dollars is, as we understand it, a special deposit with the State of Nebraska upon the basis of which the original license to do business in Nebraska was granted and may be applicable only to Nebraska claims, and that the other One Hundred Thousand (\$100,000.00) Dollars was deposited as a basis for licenses granted to the Lion Company to do business in other states, and is the fund, we believe, from which certificates of deposit are now being cashed and used; that such funds or deposits will be very much exhausted, if not entirely dissipated, and the rights of creditors jeopardized, if this litigation is heard in its regular order on the docket of the Supreme Court of the United States.

3. That the federal receivers have been handicapped in connection with many lawsuits brought in the districts wherein they are qualified as receivers, because unable to obtain from the Nebraska litigants the files pertaining thereto, and that large judgments which otherwise should not have been obtained have been entered, and other damage has been done and will be done in the future by a continuance of this situation.

4. That a great number of claims both in the federal proceeding and the state proceeding are held in abeyance, and should have attention, and that large sums of interest thereon should be stopped.

5. That both the federal receivers and the Nebraska Department's agent have employed counsel and been brought into the same litigation in more than one district with a resulting duplication of work and of expense. That an early determination would prevent further multiplicity of suits and further duplication of expense.

6. That the federal receivers are without funds to pay, among other items, taxes on land in their jurisdiction. That aside from said land, which is an undivided interest situated near Duluth, Minnesota, there are two special deposits in the jurisdiction in which the federal receivers have been appointed as ancillary receivers, which the federal receivers have not been able to reduce to possession because, among other things, of the present conflict. Such assets in the way of personal property as the federal receivers have been able to collect have been few in number, because said receivers have not had the books and records of the company. In the jurisdictions in which they are the qualified and acting receivers they have been diligent in collecting such assets as after searching inquiry they were able to discover. There have been realized from such items approximately Three Thousand (\$3,000.00) Dollars only. This amount has been entirely paid out long since in qualifying bonds, court costs, and other expenses. In obtaining ancillary appointments the federal receivers have incurred a considerable expense for the fees of attorneys who presented petitions in foreign jurisdictions, which expense said receivers have not been able to pay. Furthermore the federal receivers have not received, nor have their counsel received for their services, which have taken a vast amount

of time, from the commencement of the federal court proceedings to date, any compensation whatsoever.

Upon the foregoing grounds and in view of the circumstances outlined, the undersigned respectfully pray this Honorable Court to advance this case upon the docket of the Supreme Court of the United States; and make provision, if it is possible for this Honorable Court so to do, for payment of the aforesaid taxes and expenses, and compensation for the federal receivers and their counsel, all to the end that this controversy may be brought to an early and equitable conclusion.

Respectfully submitted,

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER.

FILED

OCT 2 1922

WM. P. STANBURY  
CLERK

IN THE

**Supreme Court of the United States.**

OCTOBER TERM, 1922.

No. **574**

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LION BONDING AND SURETY COMPANY,

*Petitioner,*

vs.

A. H. KARATZ,

*Respondent.*

---

**BRIEF OF RESPONDENT.**

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BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondent.

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IN THE  
**Supreme Court of the United States.**

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No. ———

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*Respondent.*

---

**BRIEF OF RESPONDENT.**

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*To the Supreme Court of the United States:*

On May 2nd, 1921, the respondent filed his complaint in equity in the District Court of the United States for the District of Minnesota, in behalf of himself and all other parties similarly situated who should desire to make themselves parties, against the petitioner. The substance of the complaint is recited at the outset of the opinion of the Circuit Court of Appeals for the Eighth Circuit in Lion



Bonding and Surety Company against Karatz, reported at 280 Federal, page 532, and appearing in the Advance Sheet of the Federal Reporter of August 24th, 1922. An order was made by Honorable Wilbur F. Booth on May 2nd, 1921, appointing receivers of all the property and assets of the Lion Bonding and Surety Company wherever situated.

Within ten days after said date and pursuant to Section 56 of the Judicial Code, Volume 1, Compiled Statutes 1916, page 1161, Section 1038, respondent caused a certified copy of bill and order so appointing receivers in Minnesota to be filed in six Federal districts of the Eighth Judicial Circuit, of which the District of Nebraska was one. Respondent also caused bills of complaint to be filed in nine other federal districts, and the same receivers were appointed in each of said districts as ancillary receivers. Thus the receivers first appointed in Minnesota became qualified and are acting as such in sixteen federal districts, in some of which the company had substantial property, though the bulk of the property of the company was in Nebraska. The company had been doing business in nineteen states.

As appears at page 88 of the Transcript in Case 5902 in the Circuit Court of Appeals for the Eighth Circuit a number of judgments had been entered in Minnesota against the company. The suit of respondent sought a liquidation of the business of the company and a protection equally for its creditors. Before the Minnesota proceeding was commenced the insolvent and deplorable condition of the Lion Company, through a joint report made by several insurance commissioners, which was on file with the Insurance Commissioner of Minnesota, and the

fact that no receiver had been appointed, or liquidation sought in Nebraska, were matters of current knowledge.

On April 12, 1921, in Douglas county, Nebraska, a proceeding had been started pursuant to Laws of Nebraska, 1919, Paragraph 2 of Section 4, Article III of the Act, upon the petition of the Department of Trade and Commerce of the State of Nebraska. Though the company was hopelessly insolvent, had been indulging in unlawful practices, and its capital and surplus were entirely dissipated, the Department had been granted leave *to conduct the business* of the company until it should appear proper for the officers of the company to resume possession of its property and the conduct of its business; and one Amos Thomas, as Special Agent of the Department, was proceeding to conduct the business, at a salary of \$1,000 a month, and despite the efforts of the receivers appointed in Minnesota, to obtain the possession of files, records and property in his hands, Thomas has continued in possession of the Nebraska assets of the company, which constituted the bulk of its property, and used from April 12th, 1921, to December 31st, 1921, as we understand, approximately \$100,000.00 in the attempt to conduct the business and conserve the assets, which may not constitute as much as \$500,000.00 in value. Under the circumstances, it would seem that the plan to conduct the business was a protection to officers of the company but not to creditors.

On May 23rd, 1921, in an argument in the Circuit Court of Appeals for the Eighth Circuit upon counsel's application for disapproval of the exercise by the receivers of extraterritorial authority, pursuant to their qualifications under Section 56 of the Judicial Code, counsel for petitioner herein was asked searching questions as to the char-

acter and extent of his Nebraska proceeding. Counsel, returning to Nebraska, *five days* after that hearing, and *on May 28th, 1921*, still *three days* before the Circuit Court of Appeals rendered its decision on his application aforesaid, made application now in behalf of the Nebraska Department of Trade & Commerce, although in the argument before the Circuit Court of Appeals for the Eighth Circuit he had appeared for the Lion Bonding and Surety Company, for an order in Douglas county, Nebraska, for liquidation of the Lion Company, and an order therefor was granted. Three days later, *on May 31st, 1921*, the Circuit Court of Appeals filed its order denying the application to disapprove the extraterritorial authority of the Minnesota receivers. The order was qualified by the statement that the right of the Minnesota receivers to possession of Nebraska property was subject to *such* right of possession as the Nebraska Department of Trade and Commerce had, and said, following the usual rule in comity, that the order was without prejudice to the right of the receivers to apply to the state court for the Nebraska property. It appeared to the receivers appointed in Minnesota that the Nebraska State Court, by its action on May 28th, 1921, had pre-judged any application they might make under the rule in comity. Conceiving then that their proper course to be to apply in the forum of their election for possession of the property as against the Department of Trade and Commerce, the receivers brought suit on September 6th, 1921, in the United States District Court for the District of Nebraska at Omaha, to obtain a determination of the question of prior right to possession and asked for an injunction against the Department of Trade and Commerce and other defendants named. On

September 24th, 1921, upon the hearing, the bill of complaint was on motion dismissed, and the injunction denied by Judge Woodrough. On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, a decision was on April 28th, 1922, rendered, which now appears in Volume 280 of the Federal Reporter at page 540, and is reported in the August 24th, 1922, Advance Sheet of the Federal Reporter, reversing the order of Judge Woodrough, and holding that the receivers appointed in the United States District Court for the District of Minnesota have exclusive right to the possession of all the assets of the Lion Bonding and Surety Company, because the proceeding in Nebraska was for a temporary purpose only, not involving the title of the property of the insurance company. In the same Federal Reporter at page 532 is a decision in Lion Bonding and Surety Company against Karatz, which affirms the decision of Judge Booth retaining jurisdiction of the Minnesota receivership and denying defendant's motion to dismiss and vacate the appointment of the receivers. This opinion, we think, passed upon the questions which were raised by counsel in the case entitled in the Circuit Court of Appeals for the Eighth Circuit, Number 6007, wherein counsel petitions for a writ.

On page 3 of counsel's brief and elsewhere, are references to the proceeding in Nebraska, as being "the initiation of liquidation and administration proceedings," "that the court had undertaken to direct its liquidation" and of "due and regular proceedings for the purpose of conservation and liquidation." When the receivers were appointed in Minnesota, the only Nebraska proceeding was one "to conduct the business". We think the brief statement given—detailing just how and when, in the Nebraska

State Court, liquidation proceedings were hurriedly sought 26 days after the appointment in Minnesota—speaks for itself.

After the decisions of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on April 28th, 1922, and now reported as aforesaid, respondents applied, in June 1922, to Honorable J. W. Woodrough, United States District Judge for the District of Nebraska, for an injunction to restrain the Department of Trade and Commerce and its representatives from removing, secreting and disposing of the property of the Lion Company in their hands, or from doing any other action in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division, Judge Woodrough granted the injunction. Upon the date of hearing thereon, counsel appeared before Judge Woodrough with an order of a Judge of the Nebraska State Court, of which he now makes much, and to which he refers in Case No. 467 in his petition and brief therein on page 31. This order gives expression to a view of the case entertained by counsel. On July 7, 1922, upon final hearing of the case of Hertz, et al., vs. Lion Bonding and Surety Company, et al., before Judge Woodrough, Amos Thomas, personally and as Agent of the Department of Trade and Commerce, admitted, as we understood his testimony, that the Federal injunction had not been obeyed.

We believe that national courts are not to be denied their right to proceed in equity, to appoint a receiver, determine a corporation's solvency and distribute its assets, and that no State Statute or proceeding to conduct business thereunder can impair or destroy that power.

## ARGUMENT.

1. As a foundation for his theory, that of local or state control, the case of *Relfe v. Rundle*, 103 U. S. 222, and a few kindred cases, readily distinguishable from the case at bar and to be construed in the light of their peculiar statutes, are cited by counsel.

In the case at bar the Nebraska Department when Receivers were appointed in Minnesota was neither statutory successor or liquidator of the Lion Company, and no attempt had been made to liquidate or dissolve. The instant case is more in line with *O'Connell vs. Hubbard*, 272 Fed. 961, where under a somewhat similar statute the Court holds that title is not vested in the state officer, nor is he a quasi assignee, and that he cannot bring suit outside the jurisdiction of the court that appointed him.

2. The Nebraska proceeding, judged as of May 2nd, 1921, when Receivers were appointed in Minnesota, or as of May 11th, 1921, when a certified copy of the bill and order appointing receivers was filed with the Clerk of the United States District Court for the District of Nebraska, was a proceeding "to conduct the business" only. The rule as to conflicting liquidation proceedings and their priorities would not apply to a proceeding begun for a temporary purpose, that does not affect the *title* to property or seek a change therein. As said in *Pomeroy's Equity Jurisprudence*, Fourth Addition, Volume 4, Section 1591, page 3748, "Where the first proceeding is not in rem in its nature and the effect of the proceeding will not be to disturb the title of the res, a receiver may be appointed



of the entire property notwithstanding the pendency of a prior proceeding. For example, a receiver is sought to manage the affairs of the insolvent corporation until such time as the corporation itself can pay its debts and assume the management of its property; there is no reason why a receiver should not be appointed in proceedings, which though subsequently begun, have as their object the final disposition of the property."

Many cases have not taken cognizance of the logical and important distinction between proceedings such as seek a transfer and title to the property and other proceedings; and the determination of the important question arising from different appointments of the courts in concurrent jurisdictions has erroneously been made to depend on the test of primacy rather than on the true test which takes into account the character of proceedings.

As was stated by Justice Miller in a very early case, *Buck v. Colbath*, 3 Wall, 334, 18 L. Ed. 257: "It is not true that a court having obtained jurisdiction of the subject matter of a suit and of parties before it, thereby excludes all other courts from the right of adjudicating upon other matters having a very close connection with those before the first court; in examining into the exclusive character of the jurisdiction of such cases we must have regard to the nature of the remedies, and the character of the relief sought." If the Minnesota proceeding for liquidation of the business of Lion Bonding & Surety Company had not been commenced, the Nebraska Department might still be conducting the business of this admittedly insolvent concern.

Another contention of appellants is based upon the rule laid down and followed in practice in a case, phases of

which are reported in 206 Fed. 772, 209 Fed. 300, 217 Fed. 187, 242 Fed. 658, known as the Kansas Natural Gas litigation, the opinion in 217 Fed. 187, having been written by his Honor Judge Hook, wherein the point is made that in two proceedings in which different relief is sought and in which there are conflicting receiverships one court may hold the assets until it accomplishes the purpose of the proceeding brought therein, and thereafter turn the property over to the conflicting receivership so that it may accomplish the purpose for which it was brought. Applying this rule to the instant case, when the Federal receivers were appointed, the Nebraska proceeding was merely one to conduct the business and turn it back to its owner, and if that proceeding had not, at the time of the appointment of the Federal receivers, accomplished the purpose for which it was brought, that purpose certainly had been accomplished and the function of the Nebraska Department of Trade and Commerce under its appointment of April 12th, 1921, had been wrought on May 28th, 1921, when the Nebraska Court was asked to appoint the said Department an agent for the purpose for which the Federal receivers had already been appointed, i. e., that of liquidation. Accordingly, the Federal receivers had constructive possession of the Nebraska assets of the defendant company, if not at the time of their appointment, certainly on May 28th, 1921.

It must also be borne in mind that the original proceeding in the District Court of Douglas County, Nebraska, which was one brought pursuant to Chapter 190, Section 3147, Laws of Nebraska, 1919, was brought pursuant to paragraph two of said section, which provided that upon application of the Department of Trade and Commerce the

court might direct the Department to take possession of the property and conduct the business of an insurance company, and that the later proceeding, commenced on May 28th, 1921, while marked "Supplemental" to the original proceeding was in fact, not that, but an independent action, brought to liquidate the business under a different paragraph of the statute aforesaid, namely paragraph three thereof, and that under well recognized principles of law it could not be in aid of and as a part of the original proceeding, but must have been, and was independent and self-operating. From all of the above it follows, that at latest when the original Nebraska proceeding was abandoned, after the argument before the Circuit Court of Appeals on May 23rd, 1921, and the right to receivership and liquidation was on May 28th, recognized by the Nebraska Department, that the property of the company in Nebraska passed from the possession of the Nebraska Department to the Federal receivers, who were appointed on May 2nd, 1921, and who qualified in Nebraska on May 11th, 1921.

And as is said in the case of *Shields v. Coleman*, 157 U. S. 168, at page 178:

"The mere fact that in the progress of an attachment or other like action an exigency may arise which calls for the appointment of a receiver does not make the jurisdiction of the court in that respect relate back to the commencement of the action."

And on page 179 of the same report:

"It is true that the court had the power to enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill, so as to invalidate action taken by other courts in the meantime."

3. A single question is presented in the case of Ward vs. Foulkrod, 264 Fed. 634. In answering the question, on which his Associate Circuit Judge Buffington writes a very brief opinion, Circuit Judge Wooley seeks to classify decisions growing out of conflicting appointments, and to formulate a course of procedure. In the case under consideration both appointments were of receivers to continue the business.

Counsel quotes from this case a sentence therein, clearly obiter, which occurs immediately below another expression in which we feel confident this Court would not concur. Judge Wooley says, "It is elementary that the state which creates a corporation alone has the power to wind up its affairs and dissolve it." Yes, dissolve it, perhaps, but not wind up its affairs. Surely a Federal court can appoint a receiver and distribute assets in accordance with the equitable rights of the parties, though a suit to dissolve the corporate entity or a stockholder's suit affecting the internal management may be more properly cognizable in the Courts of domicile.

In the O'Neil case, 245 Fed. 261, Circuit Judge Wooley again rendering the opinion, the Court has before it a suit in which the Insurance Commissioner of Pennsylvania had commenced a proceeding to *liquidate* an insurance company. One day before the return day therein, a stockholder brought suit seeking conservation of the company property, and the defendant consenting, a receiver was appointed. The next day liquidation was ordered in the first proceeding. The Court holds *the first liquidation proceeding*, entitled to hold the receivership. We seek the same result in the instant case, that the Minnesota proceeding—the first brought for liquidation—be upheld.

There is no "inescapable conflict" here.

4. As to the amount in controversy, when a bill in equity brings under the direct control of the court all of the property and estate of defendant to be administered for the benefit of all entitled to share in the fruits of the litigation, the possession of the property being necessary to the granting of the relief sought, the value of the assets of the corporation—the corpus of the property brought into the hands of the court for administration—is the amount in controversy.

*Towle v. Society*, 60 Fed. 131;

*Taylor v. Decatur Land Company*, 112 Fed. 449;

*Jones v. Mutual Fidelity Company*, 123 Fed. 506;

*Putnam v. Timothy Dry Goods Company*, 79 Fed. 454;

*Kent v. Housinger*, 167 Fed. 619.

Also cases such as

*Dill, et al., v. Supreme Lodge, Knights of Honor*, 226 Fed. 807; and

*Cummings v. Supreme Council*, 247 Fed. 992,

hold that where one sues on behalf of himself and others similarly situated the amount in controversy is the interest of the class.

5. Equity does not require the doing of a vain thing. We submit that the rule that a simple contract creditor is not entitled to equitable relief until he has first reduced his claim to judgment and exhausted his remedy at law has exceptions to it, as well recognized as the rule itself.

*Williams v. Adler-Goldman Comm.*, 227 Fed. 374, 142

C. C. A., page 770 (8th Ct.)

Affirming (D. C.) 211 Fed. 530.

As said in *Case v. Beauregard*, 101 U. S. 688, "Neither law nor equity require a meaningless form. \* \* \* It

has been decided that where it appears by the bill that the debtor is insolvent and that an issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite for equitable interference."

6. It is well settled that a Federal Court notwithstanding Section 265 of the Judicial Code of the United States has power to protect its own jurisdiction and to render its judgments and decrees effectual.

Dietsch v. Huidekoper, 103 U. S. 494;

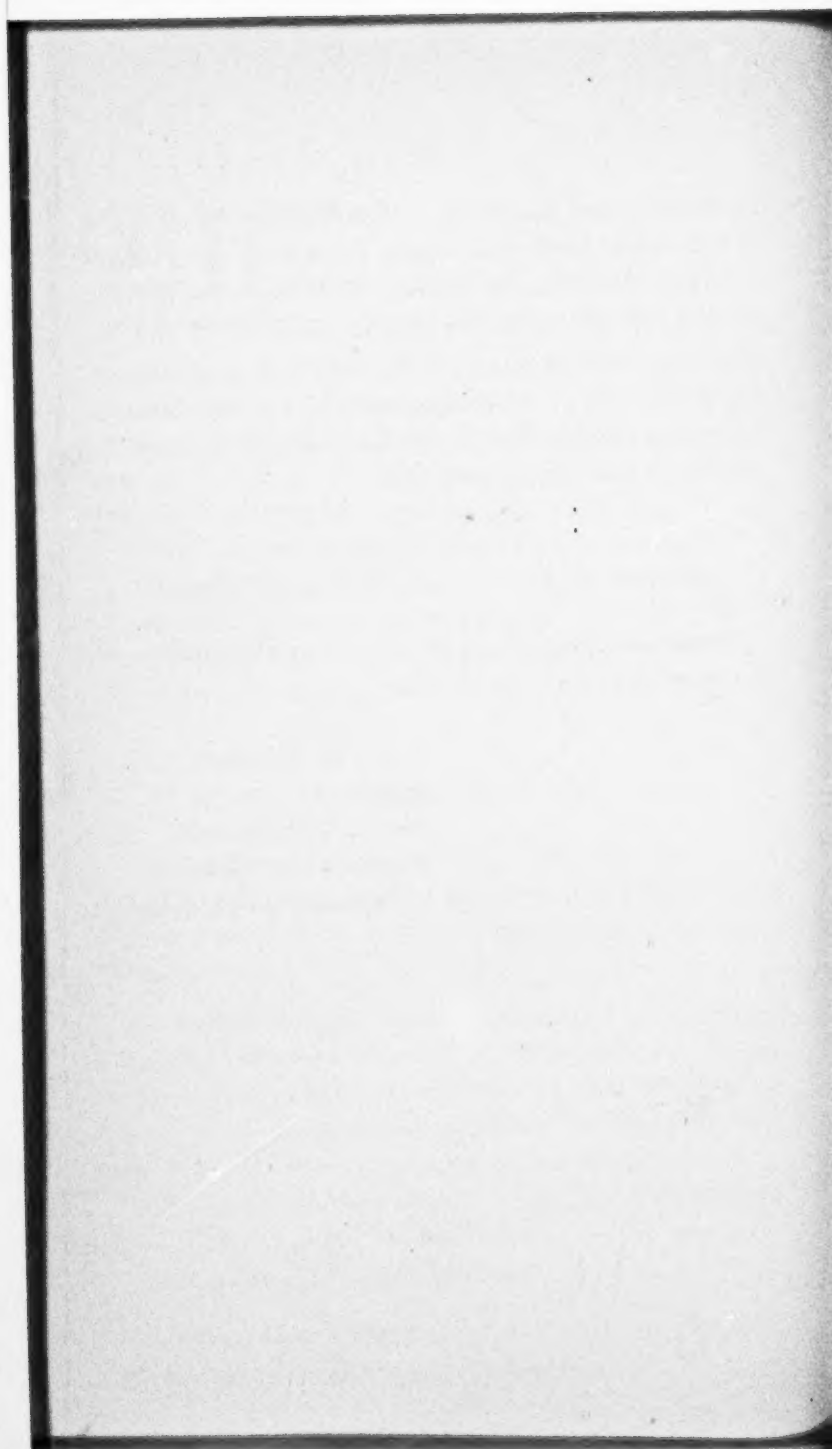
Julian v. Central Trust Co., 193 U. S. 93;

Looney v. Eastern Texas R. Co., 247 U. S. 214.

Respondent prays that this court deny the petition for a writ of certiorari.

BRUCE W. SANBORN,  
WILLIAM G. GRAVES,  
SAMUEL G. ORDWAY,  
WILLIAM R. KUEFFNER,  
Counsel for Respondent.





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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

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No. 574

LION BONDING AND SURETY COMPANY

*Petitioner*

v.

A. H. KARATZ

*Respondent*

---

No. 467

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF  
NEBRASKA, *et al.*

*Petitioners*

v.

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the LION BONDING  
& SURETY COMPANY

*Respondents*

---

Writs of Certiorari to the United States Circuit Court of  
Appeals for the Eighth District

---

**Brief of Superintendent of Insurance of New York  
Appearing Amicus Curiae**

---

FRANCIS R. STODDARD, Jr.

*Superintendent of Insurance  
of the State of New York*

CLARENCE C. FOWLER

*Counsel for New York Superintendent  
Appearing Amicus Curiae*

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## CHAPTER I

### THEORY

The first part of the book is devoted to a general theory of the subject, which is of great importance in the study of the history of the world.

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**Supreme Court of the United States**

OCTOBER TERM, 1922.

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LION BONDING AND SURETY COMPANY,

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*v.*

A. J. HERTZ and JOHN I. LEVIN, as Receivers of the LION  
BONDING & SURETY COMPANY,

*Respondents.*

---

*Writs of Certiorari to the United States Circuit Court of Appeals  
for the Eighth District.*

---

**BRIEF OF SUPERINTENDENT OF INSURANCE OF  
NEW YORK APPEARING AMICUS CURIAE.**

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**Statement of Case.**

The State of Nebraska has enacted statutes for the regulation and supervision of the business of insurance and of corporations and other persons engaged in such business.



These laws provide for the regulation and supervision of insurance corporations and other insurers from organization to dissolution, including the distribution of their property and assets, and an administrative department of the State government, known as the Department of Trade and Commerce, has been created to administer the laws and with the power to take possession of the property and conduct or liquidate the business of delinquent insurers. The statutes are designed for the protection, primarily, of policyholders and creditors and, secondarily, of stockholders and other persons interested.

Deposits of securities are required of several kinds of insurance corporations organized under the laws of Nebraska by such statutes for the better security of their policyholders, creditors, and other persons interested. The deposits are made with the Department of Trade and Commerce of the State of Nebraska. Article 4, Sections 13 and 15 (Ch. 74, Laws 1917 Nebr.).

The Lion Bonding and Surety Company was organized under the laws of the State of Nebraska, and made a deposit with the Department of Trade and Commerce as required by the laws of the State, which deposit consisted of securities amounting, at market value, to the sum of \$256,900.00, the securities being of the class contemplated and permitted by the statute (Rec., 574, p. 77). Upon completing this organization and making the deposit, the Lion Bonding and Surety Company was authorized to do business. The corporation became delinquent within the meaning of the laws of the State of Nebraska and, pursuant to the laws of that State, the Department of Trade and Commerce made an application to the Court for an order authorized by the statute. An order was granted on the 12th day of April, 1921, and the Department of Trade and Commerce took possession of the property, records and effects and commenced to conduct the business of the Lion Bonding and Surety Company in accordance with the Nebraska Statutes.

After those proceedings were taken and the Department of Trade and Commerce of the State of Nebraska had taken possession and commenced to conduct the business of the Lion Bonding and Surety Company, a person claiming to be a creditor filed a bill of complaint in the United States District Court for the Fourth District of Minnesota, and Messrs. Hertz and Levin were appointed receivers of the Lion Bonding and Surety Company.

The Department of Trade and Commerce made a motion in the District Court of Minnesota to dismiss the bill and discharge the receivers. This motion was denied. An appeal was taken to the Circuit Court of Appeals (Rec. 574, pp. 99-100). The Minnesota receivers filed a bill in equity in the United States District Court for the district of Nebraska, in which they impleaded as a defendant, the Department of Trade and Commerce of the State of Nebraska and the Lion Bonding and Surety Company, its officers and directors. The United States District Court of Nebraska dismissed the bill of the Minnesota receivers (Rec. 467, p. 473). The receivers appealed from the order to the Circuit Court of Appeals which reversed the decree of dismissal, reinstated the bill and directed the lower court to issue an injunction restraining the Department of Trade and Commerce from executing any functions, except to hold the custody of the property and records of the Lion Bonding and Surety Company "subject to the further order of the United States District Court for the district of Minnesota, Fourth Division."

#### **New York State Interested.**

The State of New York is interested in this litigation. New York has legislated with reference to the regulation and supervision of the business of insurance and its statutes relating to deposits of securities and conducting and liquidating the business of delinquent insurers are in substance identical with the laws of the State of Nebraska which are rendered nugatory in

practical effect by the decisions of the Federal Courts shown in the records in these cases. The Superintendent of Insurance, like the Department of Trade and Commerce, is an administrative officer of the state government. The New York Superintendent of Insurance holds in his possession pursuant to statutes similar to those of Nebraska fifty-three millions of dollars of deposits made by domestic, foreign state and foreign country corporations for the protection of policyholders and creditors. The New York Superintendent of Insurance is at present liquidating twenty-two insurance companies and conducting the business of one life insurance company under a statute which was enacted by the state legislature in 1909, and which has been amended from time to time. The statute in its present form is shown in Appendix A, hereto annexed. The Nebraska law was enacted subsequent to the New York law. Prior to recent amendments, both laws were the same, except that in place of the "Superintendent of Insurance" in the New York law the "Department of Trade and Commerce" was inserted in the Nebraska statute.

The economical results obtained from liquidations under the New York statutes have become well known to the insuring public and have been recognized by the New York courts to such an extent that the New York courts have recently held that a receiver will not be appointed in place of the state liquidator. *Knickerbocker Life Insurance Co. (People, etc. v. Knickerbocker Life)*, 199 App. Div., 503.

The decrees of the Federal Courts, if allowed to stand, will destroy the statutes of New York, Nebraska and other states having similar laws for the regulation of the business of insurance and the statutory deposits required for policyholders.

## POINT I.

The proceeding in Nebraska in which the Department of Trade and commerce acquired possession and control to conduct the business presented a question between the State and one of its corporations.

Karatz and other creditors and stockholders were not proper parties to such a proceeding.

- Hooper v. California*, 155 U. S., 648;  
*Phila. Fire Assn. v. N. Y.*, 119 U. S., 110;  
*German Alliance v. Hale*, 219 U. S., 307;  
*Peo. v. Buffalo S. & C. Co.*, 131 N. Y., 140;  
*Regener v. Hubbard*, 40 A. D., 359;  
*People v. Ballard*, 134 N. Y., 269;  
*Peo. v. Fire Assn.*, 92 N. Y., 311;  
*Ward v. Farrell*, 97 Ill., 593;  
*Peo. v. Holmes*, 151 A. D., 257;  
*Peo. v. Formosa*, 131 A. D., 478;  
*Comm. v. Vrooman*, 164 Pa., 306;  
*Peo. v. Bank S. I.*, 132 A. D., 589;  
*Knickerbocker T. Co. v. Tarrytown*, 139 A. D., 305;  
*Matter of Empire Bank*, 18 N. Y., 199;  
*Watt v. Zucca*, 160 A. D., 578;  
*Matter of Droege*, 197 N. Y., 441.

Incident to the right to regulate the business of insurance the legislature has the power to enact a law empowering a state department to conduct or liquidate the affairs of an insurance business and the distribution of its assets, when a continuance of the business would be hazardous to the policyholder or the public and such a law is constitutional.

*Chi. Life Ins. Co. v. Auditor*, 101 Ill., 82;  
*Rep. Life Ins. Co. v. Swigert*, 135 Ill., 150;  
*Fry v. Charter Oak Co.*, 31 Fed., 197;  
*Sons of Benjamin*, 187 A. D., 890;  
*Empire State Surety Co.*, 164 A. D., 586.

The statute under which the Department of Trade and the New York Superintendent of Insurance respectively are charged with the duty of acting gives discretionary power to apply for an order. When the grounds exist and the Department has exercised its discretion, it is mandatory on the court either to grant or deny the application.

If the Department or the Superintendent makes a mistake the responsibility is only to the high office of the state government.

*Matter of Atty.-Gen'l v. Atl. Mut. Life Ins. Co.*, 53 How. Pr., 227.

Under prior statutes containing similar language giving the power to the attorney-general of the state the courts held it was a discretionary power.

In *People v. Ballard*, 134 N. Y., 269, the Court said:

"We think that the question as to what the public interest requires is committed to the absolute discretion of the Attorney General and that it cannot be made the subject of inquiry by the courts. If he abuses the great power entrusted to him a remedy may be found in his removal from office or in the election of a successor worthy of the high position."

In *People v. Loew*, 117 N. Y., 175, Judge Earl said:

"This section shows that the Legislature had in mind the public, not private interests, in authorizing the action,

and that the Attorney-General was expected to consult and regard public and not private interests in instituting it. He is to determine in the first instance whether the public interest requires an action to be brought and he may act upon his determination subject to no control."

The proceeding brought under the statute is not an action or a special proceeding within the meaning of the procedural laws of either Nebraska or New York. The proceeding is not commenced by the service of a summons or a writ in an action or proceeding defined or permitted by the procedural code of either state. A proceeding under the statute involved in these cases can be conducted from beginning to end without reference to the Nebraska procedural code.

The proceeding is a special statutory proceeding incorporated in the insurance laws of each state and is not found in the codes provided for the trial and determination by the courts of actions between citizens.

The object of the statute is to provide the government with a summary proceeding for the protection of the public against unsafe, unsound and unauthorized insurance organizations, and the duty of enforcing the law is imposed upon the administrative division of the government subject to the approval of the court.

The proceeding has been described as one in the nature of *quo warranto*, or *quasi criminal*.

*Chi. Mut. L. Ins. Co. v. Hunt*, 127 Ill., 257; 2 L. R. A., 549;  
*Chi. L. Ins. Co. v. Auditor*, 101, Ill., 82;  
*Rep. L. Ins. Co. v. Swigert*, 135 Ill., 150.

The statute of Nebraska like the statute of New York is a positive law declaring the policy of the states respectively with relation to the subject of insurance.



The courts of New York have construed the New York statute to mean one of enlargement rather than one of restriction. *Hartigan v. Casualty Co. of Am.*, 180 A. D., 194; that there shall be but one liquidator (*Igel v. Phillips*, 183 A. D., 220); that the statute is a special statute and controls over general laws (*Matter of Murray Bank*, 153 N. Y., 199), and declares the policy of the law of the state on the subject of insurance (*Matter of Sons of Benjamin*, 187 A. D., 890; *Empire State Surety Company*, 214 N. Y., 553).

The policy of the law is stated in the language of the courts of New York as follows:

In *Rinn v. Astor Fire Ins. Co.*, 59 N. Y., 143, the court said at page 147:

"It is essential to the complete and proper administration of the system established by the statute, that all questions respecting the claims of creditors upon the fund in the hands of the receiver, and its distribution, and the accounting by the receiver should be determined upon application to the court in the action in which the receiver is appointed. Each creditor has the right to be heard in respect to his own demand, and to contest the demands of others (9 Paige, 600; 2 Barb. Ch., 35)."

In *Marshall v. Wendell*, 45 A. D., 120, the Appellate Division said (p. 122):

"It is the policy of the law in order to expedite the administration, avoid excessive expense, secure uniformity in remedies, and equality in rights among creditors, to bring all claimants against the estate into the common forum which will be provided, if necessary, in the action itself, in which the corporation is dissolved and the receiver appointed. (Code Civ. Pro., A1806; 2 R. S., 469, 73; *Sands v. Kimbark*, 27 N. Y., 147; *Rinn v. Astor Fire Insurance Co.*, 59 *id.*, 143; *Austin v. Rawdon*, 42 *id.*, 155; *Matter*

*of Harmony Fire & Marine Insurance Co.*, 45 *id.*, 310; *Phoenix Foundry & M. Co. v. North River Const. Co.*, 33 Hun, 156.)”

## POINT II.

**The Department of Trade and Commerce of the State of Nebraska is an administrative department of the State government.**

The Nebraska statute from which the Department of Trade and Commerce derives its power is Chapter 190, Nebraska Laws, 1919, known as the “Civil Administrative Code” (Comp. Stat. Neb., 1922, Secs. 7745-7748).

The statute is quoted in part in the brief of the petitioners herein, and it is respectfully submitted that the brief of the petitioners shows conclusively that the Department of Trade and Commerce is an administrative division of the State government of Nebraska (Point VII, p. 59 *et seq.*).

Under the New York laws, the same functions are performed by the Insurance Department, the chief officer of which is the Superintendent of Insurance, who is appointed by the Governor by and with the advice and consent of the Senate, and is a constitutional officer of the State (Chap. 33, Laws of 1909; Chapter 28 of the Consolidated Laws, Art I, sec. 2).

The administerial department itself is to conduct or liquidate in Nebraska, while in New York it is not the administerial department which is to act under Section 63, but the officer thereof.

*Department of Trade is not an officer of the court.*

The Superintendent of Insurance in liquidation proceedings of an insurance company, like the Superintendent of Banks in liquidation proceedings of banking corporations, acts, to a large extent, independently of the court and under authority proceeding directly from the legislature. It is true that his determinations, like the determinations of the Superintendent of Banks, are subject to eventual review by the court, and in the case of the Superintendent of Insurance, as we have already shown, the court is given authority to exercise a limited control or supervision in certain matters arising during the conduct of the liquidation proceedings. For example, the proceedings under Section 63 are initiated by order of the court on the application of the Superintendent (Section 63, Subdivision 3). The court is authorized to issue injunctions in aid of the liquidation (Subdivision 2). The court may also determine the date upon which the rights and liabilities of the corporation and its creditors, etc., shall be fixed (Subdivision 3), and it may, after the Superintendent has liquidated the statutory trust fund, and paid all the claims of policyholders therein, declare by order any surplus remaining to be general assets of the Insurance Company (Section 104). But the statute expressly provides (Subdivision 3) that:

*"Such liquidation shall be made by and under the direction of such superintendent and his successors in office who may deal with the property and business of such corporation in their own names as superintendents." (Italics ours.)*

The position of the Superintendent of Insurance, acting as liquidator or conducting a business under the Insurance Law, is thus very different from what the position of a receiver would be.

This distinction has been well stated in *Matter of Union Bank of Brooklyn*. 176 App. Div., 477, which involved a liquidation by the Superintendent of Banks of the State of New York pursuant to the Banking Law. The facts in this case were that upon a petition by the Superintendent of Banks to the Supreme Court for an order authorizing him to pay a dividend to the creditors of the bank, the court issued an order directing the Superintendent to sell all the assets of the bank on or before a certain date and immediately to foreclose all of its mortgages. The Appellate Division reversed this order, saying at pages 481 and 482:

"I think that the court overlooked a distinction between the Superintendent as a liquidator, and a receiver appointed by the court, that excluded the former from the power of the court exercised in this instance. The former common-law right of banking is now a franchise derived from the Legislature (*Attorney General v. Utica Ins. Co.*, 2 Johns. Ch., 377; *People v. Utica Ins. Co.*, 15 Johns. 378), and the Superintendent is the head of the department for the State regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. He is of the administrative branch of the government, appointed by the Governor and confirmed by the Senate. (Banking Law, §10.) He is a State officer. (Public Officers Law—Consol. Laws, Chap. 47; Laws of 1909, Chap. 51—§2; *People ex rel. Baird v. Nixon*, 158 N. Y., 221.) And as such officer he is expressly clothed by the Legislature with this power of liquidation. (Banking Law, §69.) His possession is not that of the court. The statute declares that he may forthwith take possession of the business and property of a banking corporation that has violated its charter or any law; is conducting its business in an unauthorized or unsafe manner; is in an unsound or unsafe condition to transact business; has an impairment of its capital; has suspended payment of its obliga-

tions, or has neglected or refused to comply with the terms of a duly issued order of the Superintendent. (*Id.*, §57.) When he 'shall have duly taken possession of such corporation . . . he may hold such possession until its affairs are finally liquidated by him.' (*Id.*, §58) He 'is authorized, upon taking possession of the property and business of such corporation . . . to liquidate the affairs thereof and to do all acts and to make such expenditures as in his judgment are necessary to conserve its assets and business.' (*Id.*, §69.) 'The moneys collected by the Superintendent shall be from time to time deposited in one or more State banks, savings banks or trust companies.' (*Id.*, §70.) As to his further duties and powers, see Section 79 of the Banking Law. Thus it appears that as Superintendent he takes possession, holds possession until final liquidation by him, and is authorized to liquidate, outside of any judicial proceedings. The fact that he must receive the sanction of the court before certain steps in his procedure are effective (*e. g.* §§63, 699, 74, 78, 79) does not imply that the liquidation itself is judicial.

"A receiver is the creature of the court. He is often termed the 'hand of the court.' He is described as if a sheriff of the Chancery Court. (High Receivers—4th Ed.,—§2; *Matter of Merchants Ins. Co.*, 3 Biss., 165.) The court that made him can unmake him and take the property from him. (*New York & W. U. Tel. Co. v. Jewett*, 115 N. Y., 168.) The property is in his possession as the possession of the court, *in custodia legis*. (*Atlantic Trust Co. v. Chapman*, 208 U. S., 371; *Merritt v. Lyon*, 15 Wend., 421; *Matter of Christian Jensen Co.*, 128 N. Y., 553; *Matter of Tyler*, 149 U. S., 164.)" (*Italics ours.*)

A similar view on this question has been taken by the Court of Common Pleas of Pennsylvania in a recent decision in an action brought by *Thomas B. Donaldson as Insurance Commissioner against the Jefferson Fire Insurance Company of Philadelphia* (No. 4 Commonwealth Docket 1921). The opinion in this case is in part as follows:

"The authority of the court is limited and does not extend to the details of liquidation; it is not authorized to interpose an approval or disapproval of the action of the statutory Liquidator. The court can do only what the statute authorizes it to do and the supervision of liquidation is not conferred upon it.

"In the cases of *Norwegian Street*, 81 Pa., 349; *Harris v. Mercur*, 202 Pa., 313, the Supreme Court said:

"In all cases in the court where the authority to proceed is conferred by statute and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding therein prescribed is mandatory and must be strictly complied with."

"For these reasons the petitioner needs no such order of the court as prayed for, nor does the court have any power to make it.

"Wherefore the order is refused and the petition is dismissed."

In *Relfe v. Rundle*, 103 U. S., 222, this Court, speaking of the Missouri superintendent who was liquidating an insolvent life insurance company, said, at page 225:

"Relfe is not an officer of the Missouri state court. \* \* \* He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute."

The New York Supreme Court has held that the Superintendent of Insurance of New York, as liquidator, is not an officer of the Court. In *Kolb v. Mortimer, et al.*, reported in New York Law Journal, December 15, 1913, Ford, J., said:



"This motion to punish defendants as for a contempt because of their failure to pay over to the Superintendent of Insurance a sum of money as directed in a judgment of this court, is based upon subdivision 4 of section 1241 of the Code. Such motions may be granted or denied in the discretion of the court (*Cochrane v. Ingersoll*, 73 N. Y., 613), and there are many considerations which impel me to exercise that discretion in favor of the defendants. The tendency of the decisions is to construe very strictly this and similar statutory remedies which are in the nature of imprisonment for debt. Here a refusal or wilful neglect to pay the money to an officer of the court must be shown. The judgment directs the defendants to pay to the Superintendent of Insurance, who was appointed liquidator of the Metropolitan Underwriting Company by the judgment. Was he an officer of the court within the meaning of section 1241 of the Code? An examination of those sections of the Insurance Law providing for his appointment as liquidator convinces me that he is not. He and his successors 'may deal with the property and business of such (insurance) corporation in their own name as superintendents or in the name of the corporation, as the court may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing them to liquidate' (Insurance Law, sec. 63, subdiv. 3). He is required to report annually to the Legislature a detailed account of his operations as liquidator, and the special deputy superintendent in charge shall file annually with the superintendent a report of the affairs of every corporation in course of liquidation. It seems to me that the reasoning of Mr. Justice Ingraham in his prevailing opinion in *General Electric Co. v. Sire* (88 A. D., 498) applies to the facts of this case. In the *Sire* case punishment as for a contempt was held unauthorized because payment was directed to be made to a receiver appointed in a prior action. Here, it seems to me, the defendants are required to pay to a liquidator designated merely rather than appointed by the court, and deriving his powers and authority from express provisions of the statute instead of from the judicial decree."



**POINT III.**

**The Department of Trade and Commerce of the State of Nebraska is entitled to the same immunity from suit that the State, eo nomine, is entitled to receive.**

The question presented by these cases is one between Karatz and other citizens of Minnesota and the Department of Trade and Commerce of the State of Nebraska, and no question of conflict of jurisdiction between Federal and State courts is presented.

The Department of Trade and Commerce of Nebraska was in possession and control of the business and property of the Lion Bonding and Surety Company, under and pursuant to the provisions of the statutes of the State of Nebraska, and was thereby charged by the administration laws of the State of Nebraska with a public duty to perform in the public interest and as a part of the police regulations of the State.

The duty was to conserve the assets of the Lion Bonding and Surety Company and at the same time to conduct the business of the company so that the public interests might be served. The duty imposed is not stated specifically in the statute, but the character of the commission determines that and commands, from the Department of Trade and Commerce, all acts requisite to the proper conduct of the business of the Lion Bonding and Surety Company, the conservation of its property and the protection of the public interests.

In addition to the State function of conserving the assets and of conducting the business of the Lion Bonding and Surety Company, the Department of Trade held a deposit of securities made by the Lion Bonding and Surety Company, which deposit was required by the State of Nebraska as a prerequisite to ob-

taining a charter from the State of Nebraska and authority to do the business of insurance. The statute under which this deposit is made provides that it shall be "for the benefit of its policyholders \* \* \*" (Sec. 13, Chap. 74, Laws 1917).

The orders of the Federal courts restrain the Department of Trade from further performing its duties and commands it to surrender all assets to the receivers of the Federal court in Minnesota.

It is not claimed that the laws of Nebraska under which the Department of Trade is acting are unconstitutional or that the Department of Trade is improperly or unlawfully performing the duties imposed upon it by the State laws.

It is provided by the Eleventh Amendment to the Constitution of the United States that no state can be sued in the courts of the United States by a citizen of another state.

The purpose of this amendment was to prohibit all suits against a state by or *for* citizens of other states, or aliens, without the consent of the state to be sued; and one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens. It was intended to operate in the interest of, and for the protection of, the several states, and it cannot be so construed as to allow the property of a state to be alienated or conveyed in a suit in equity against a subordinate official of the state. When a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done. And it is held by Matthews, Bradley and Gray, Justices, that the only remedies which the courts of the United States are authorized to administer are the remedies that the state itself has provided, and that no remedy is pro-

vided by the Constitution of the United States against the state itself for a breach of its contract by the state.

In a case in which an officer of the state, in violation of law, commits an act to the injury of the citizen, it is an act beyond the scope of his agency, unauthorized by his principal, and the state is not liable to the party injured; and in a case in which an officer is proceeding under an unconstitutional law to the injury of the citizen, such law will not protect him from suit on the ground that a suit against him is virtually a suit against the state. With this limitation the cases are clear to the point that when an officer of a state is acting in the official discharge of his duties he is entitled to the same immunity from suit that the state, *eo nomine*, is entitled to receive.

In *The Queen v. Powell* (1 Q. B., 352; S. C., 4 Perry & D., 719) a writ of *mandamus* to admit to a copy-hold tenement of a manor, belonging to the Crown, was directed to the steward alone, on the ground that there could be no *mandamus* to the sovereign, and Lord Denman, with the concurrence of Justices Littledale, Williams and Coleridge, quashed the writ, and after observing that doubtless there could be no *mandamus* to the sovereign, but that the interests of the Crown were to be as much guarded as those of the subject, said:

"If we were to allow a *mandamus* to the steward alone, and the writ were obeyed, the property of the crown would be affected indirectly by the *mandamus* to the steward alone, when it cannot be affected directly by making the sovereign a party to the *mandamus*; \* \* \* and if the advisers of the crown were of opinion its interest might be affected, and were to advise the sovereign either to order the steward not to admit the prosecutor of the *mandamus* or to revoke the appointment of the steward, this court could not grant an attachment against the steward, and then the party does not get admitted."

In *The Queen v. Comr's of Treasury* (L. H., 7 Q. B., 387-394), in which the court refused to grant a writ of *mandamus* to the lords commissioners of the treasury to compel them to pay over money in their hands as servants of the Crown, Lord Chief Justice Cockburn said:

"I take it for granted with reference to that jurisdiction that we must start with this unquestionable principle; that when a duty has to be performed (if I may use that expression) by the crown, this court cannot claim, even in appearance, to have any power to command the crown; the thing is out of the question. Over the sovereign we can have no power. In like manner, where the parties are acting as servants of the crown, and are amenable to the crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction. \* \* \* Though I quite agree that according to the appropriation they (the lords commissioners) were bound to apply the money, upon the vouchers being produced, and had no authority to relax these bills, still I cannot say that there is any duty which makes it incumbent on them to do what I cannot say they ought to have done, except as servants of the crown, because in that character they have received the money, and no other."

Blackburn, J., in the same case remarked:

"It seems to me that the obligation, such as it is, is upon her majesty, to be discharged through her servants, and you cannot proceed, therefore, against the servants."

Where an injunction to restrain the auditor and treasurer of the State of Louisiana from disposing of money in the state treasury to the prejudice of complainant, and a *mandamus* to compel the payment to him of interest on state bonds, held by him, was asked for, it was held that the proceedings were in

effect a suit against the state, and that as the state could not be sued the court had no jurisdiction.

Where an action was brought by an insurance policy-holder to compel the state treasurer of Kentucky (Tate) to deliver to the receiver of the company, for the benefit of its policy-holders, a certain fund deposited with the treasurer by the company as a condition to doing business in the state (Act of March 4, 1870, Sec. 47), the petition was dismissed. Lewis, C. J., in delivering the opinion said:

"The general assembly has not seen proper to enact a general law (as by Article 8, Sec. 6, of the Constitution they have power to do) authorizing such suits to be brought or conferred upon any court of the state jurisdiction to control and distribute the funds in the custody of the treasurer. It has been repeatedly decided by the court that, in the absence of a law authorizing it, the state cannot be made a party defendant or garnishee, and is not suable in her own courts, and 'that parties will not be allowed to evade this inhibition by ignoring the state in their suits, and proceeding directly against the public officer having custody of the money sought to be reached.' As no law has been passed by the general assembly for the disposal of the fund, it must remain in the custody of the treasurer, subject to such use or appropriation as may hereafter be provided by law, and no suit to recover or dispose of the fund can be maintained until the general assembly shall direct in what manner and in what court it may be brought."

And where a similar fund was sought to be reached by attachment, Blatchford, J., declared that

"There was no case of acknowledged authority which held that a public officer of a state charged with a trust created by a public statute of the state in respect to funds

or securities in his possession, could be made liable in respect to them by an attachment in favor of a person not claiming under the trust."

In *Lynn v. Polk* (8 Lea [Tenn.], 121) it was held that an officer, while executing a void and unconstitutional law, is not to be considered as acting under the authority of the State, and that a suit to enjoin the Funding Board (created by an act which the Court held to be unconstitutional) from funding the bonded indebtedness of the State was not a suit against the State, nor against the officers of the State, within the meaning of Chapter 13 of the Tennessee Acts of 1873.

The Commissioners appointed under an act of the Legislature of New York to drain what was known as the great swamp, exceeded their authority, and proceeded in a manner not authorized by the act, to the threatened injury of private land owners, and it was held they could be restrained by a court of equity.

In *State Lottery Co. v. Fitzpatrick* (3 Woods, 223) the officers of the State of Louisiana, charged with the enforcement of the penal laws, were enjoined from arresting or otherwise interfering with the officers and agents of the lottery company for acts done by them in the exercise of the rights conferred by their charter, which the Court held could not be repealed by a subsequent act of the Legislature without impairing the obligation of contract, and that, as the officers were acting under a void and unconstitutional law, which could neither authorize nor protect, they could be called to answer and were individually responsible.

In *Hancock v. Walsh* (3 Woods, 360), in which the Commissioner of the General Land Office of Texas was enjoined from allowing location of land within what was known as the Mercer colony, there was no act of the Legislature imposing upon him



the duty of location within the Mercer colony; and, if there had been, the Court held that such law would have been unconstitutional and void; and Woods, J., in delivering the opinion, said: said:

"If defendant violates the provisions of a contract protected by the constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of this state, and no claim that defendant is performing an official duty will avail him."

In *Preston v. Walsh* (10 Fed. Rep., 315) the same view was taken and an injunction granted, but the Court refused to grant relief in the nature of specific performance of contract, or at least a decree for title, on the ground that to effect a conveyance of title emanating from the State to public lands, the Governor of the State would have to be made a party to the suit; and Pardee, J., who delivered the opinion, said:

"The case of *Davis v. Gray* (16 Wall., 203), affirming *Osborne v. Bank* (9 Wheat., 738), on the subject of making and requiring the State to be made a party where the State is concerned, is very strong, and I feel bound to go as far as that case; but I must leave to the supreme court to go further, or declare the law that the courts of the United States can go further."

In *McCauley v. Kellog* (2 Woods, 13), Woods, J., held that an action in a court of the United States against the executive officers of a State in their official capacity, to compel them to comply with a contract of the State by the enforcement of its laws, is to all intents and purposes an action against the State, and prohibited by the Eleventh Amendment to the Constitution of the United States; and after showing that in *Davis v. Gray* and



*Osborne v. Bank*, the officers were acting under a void and unconstitutional law, says:

"No case has yet decided that a circuit court of the United States can compel the executive and administrative officers of a state to execute the laws of a state. . . . I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to-wit, a bill to compel the defendant officers of the state to execute its laws."

Where negro slaves were illegally taken from the owner on the high seas, and afterwards sold to a stranger who, without the privity of the owner, imported them into the United States in violation of law, and they were seized by an officer of the customs of the United States and delivered to an agent appointed by the Governor of Georgia, in conformity to an Act of Congress, and some of them sold by order of the Governor of the State, and the money obtained at the sale was "actually in the treasury of the State, mixed with its general funds," and the rest of the slaves remained in the hands of the agent of the State, "in possession of the Government," a libel in admiralty by the owner to recover possession of the money and slaves, though not brought against the State by name, but against the Governor in his official capacity, was held to be a suit against the State, and, therefore, by reason of the Eleventh Amendment of the Constitution, not maintainable.

In *U. S. v. Peters* (5 Cranch., 115), in which a mandamus was ordered to a District Court of the United States, sitting in admiralty, to issue an attachment against the executrices of David Rittenhouse to enforce obedience to a decree of that court for the payment of money (although Rittenhouse had been the

Treasurer of Pennsylvania, and the Legislature of that State had directed its Attorney General to sue the executrices for the recovery of the money, and the Governor to protect them against any process of the Federal Courts), the judgment of the Supreme Court, as stated by Chief Justice Marshall, went upon the ground that it was apparent that Rittenhouse held the money in his own right, and that "the suit was not instituted against the State or its Treasurer, but against the executrices of David Rittenhouse for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. The State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced"; and the Court carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the State, "or the actual property of the State, however wrongfully acquired."

In *Osborne v. Bank of U. S.* (9 Wheat., 738), the bill was originally filed by the bank against the Auditor of Ohio; and a collector employed by him (the Treasurer being subsequently made a defendant by amended bill), to prevent them from levying a tax imposed by the Legislature of that State in violation of the Constitution of the United States upon the property of the bank; and they, after the service of the subpoena, forcibly took from the plaintiff's office the amount of the tax in money and paid it over to the Treasurer of the State, who received it with notice of the facts and kept it apart from other moneys belonging to the State; or, in the language of Chief Justice Marshall, it was "kept untouched in a trunk by itself, as a deposit, to await the event of the pending suit respecting it," so that it had never come into the possession of the State; and, as said by Chief Justice Waite in his review of the case, "was in legal effect stopped while passing from the bank to the treasury. The money seized was kept out of the treasury, because if it got in it would be

irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the treasury it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the State."

In *Davis v. Gray* (16 Wall., 203), the receiver of a land-grant railroad obtained an injunction against the Governor and Commissioner of the Land Office of Texas to restrain them from encumbering, by granting patents to others, lands of which the railroad had the equitable title under a previous grant from the State, and the ground upon which the bill in that case was sustained was defined to be that when a plain official duty, requiring no exercise of discretion, is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which an adequate remedy at law cannot be had, may have an injunction to prevent it, notwithstanding the officer pleads the authority of an unconstitutional and therefore void law for the violation of his duty.

It is conceded, in *The Siren* (7 Wall., 152), and the *Davis* (10 Wall., 15) that without an act of Congress no direct proceedings can be instituted against the Government or its property, and in the latter case it is justly observed that "the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession."

In *Carr v. United States* (98 U. S., 433) it is said:

"If a proceeding would lie against the officers, as individuals, in the case of a marine hospital, it might be

instituted with equal facility and right in reference to a post-office or a custom-house or a prison or a fortification. In some cases it might not be apparent, until after suit brought, that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease."

In *Board of Liquidation v. McComb* (92 U. S., 531) the Board of Liquidation of the State of Louisiana was enjoined, at the instance of bondholders, from admitting to the privileges of the compromise proposed by the State of Louisiana, certain persons other than those originally provided for, and on different terms, because the board was, by the terms of the law, charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose. They, in fact, held the new issue of bonds in trust, and every one who gave up his old obligations, and accepted the new in settlement thereof, became a beneficiary under the trust, and entitled to a faithful performance of the terms thereof by the trustees or Board of Liquidation. It was, in fact, a suit by *cestui que trust* against trustee.

In the cases at bar there is no claim that the Department of Trade has threatened to allow persons other than those entitled to share in funds or that the business is being improperly conducted, and that such threatened acts should be enjoined. The claim here is brought to oust the Department of Trade and compel it to surrender property in its possession and to cease conducting the business.

In the case of *Pennybaker v. Tomlinson*, 1 Tenn., Ch. Rep., 111, the Home Insurance Company, of Connecticut, deposited bonds with the Comptroller of Tennessee, "*as security for risks taken by citizens of this State*" (Tenn.) Thereafter the Home Insurance Company failed. Whereupon some twelve attachments were levied against these bonds. The Comptroller came

into the Court to compel the parties, thus attaching, to interplead, and to have their claims ascertained and their rights adjudicated. All came in, excepting one Kennedy. The Court, after holding that Kennedy did not have a valid attachment because the Sheriff had not taken actual possession of the bonds, but had only delivered the writ of attachment to the Comptroller, said:

"It is even better settled that a public officer, who has money or funds in his hands to satisfy a demand which a person has upon him as a public officer, cannot be adjudged a garnishee; or, as it has been put more broadly by the Supreme Court of Massachusetts, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee (and, *a fortiori*, by direct attachment), in respect of any money or property held by him in virtue of that authority. Thus sheriffs, clerks of court, trustees of insolvents, and assignees in bankruptcy, disbursing officers, etc., are exempt from attachment or garnishment. *Drake on Att.*, S. 477, *et seq.*"

This Court held in *Lankford, etc. v. Platte Co.*, 235 U. S., 461, that the State Banking Board of Oklahoma was entitled to the same immunity that the State of Oklahoma was entitled to receive and that the Board could not be sued. That case is controlling on this point in the cases at bar.

#### POINT IV.

Neither the Federal nor the State Courts have jurisdiction over the deposit with the Department of Trade and Commerce of the State of Nebraska.

The deposit is a statutory trust and the Courts have no power to destroy or to distribute it.

The Department of Trade and Commerce of the State of Nebraska alone is empowered to administer it, and the Courts have no power to interfere with the possession and control of the Department.

Even if the property is turned over, it would not follow that the Federal court would be entitled to treat the fund as in its own possession and administer it according to its own discretion and through the exercise of the same control which it would have over it if it were in the hands of its own receiver appointed under its general equitable jurisdiction.

Article IV, Section 13, Ch. 74, Laws of 1917, of Nebraska relating to deposits is as follows:

"Domestic companies—deposit of securities. Every domestic company, excepting fire, lightning and tornado assessment associations, shall deposit all of its investment securities, not including premium notes, with the department of trade and commerce for the benefit of its policyholders until they aggregate the sum of one hundred thousand dollars, and thereafter keep such amount of its securities deposited with the department of trade and commerce and no more, as near as may be practicable: Provided, any domestic insurance company desiring to transact business in any other state may deposit with the department of trade and commerce securities to the amount and value required by such other states as a condition to the permission to do business therein by such company.



As long as the company remains solvent, it may collect the interest on all of its securities and it may withdraw any of them by depositing other of equal value. The department of trade and commerce shall give to each company a receipt for every security deposited. Every such company shall, on or before the third day of January and July of each year file with the department of trade and commerce, a true list of all its securities not so deposited with the department of trade and commerce held by such company on the last day of the preceding month. The department of trade and commerce, as often as it is deemed advisable, may cause an examination to be made of the securities held by any such company."

Section 15 of the aforesaid Article IV is as follows:

"(3180) Losses—deposits. Whenever any company shall sustain losses in excess of its other resources, the department of trade and commerce, upon proper showing may turn over to it so much of its securities as shall be necessary to provide funds to pay its losses (losses), and such securities shall not be used for any other purpose. The department of trade and commerce may allow such company a reasonable time within which to deposit other securities in an amount equal to those withdrawn. Any company entering into a reinsurance contract whereby its entire business is reinsured as provided in this chapter may, upon a showing that all its outstanding obligations have been paid or assumed by the reinsurance company, withdraw all its securities deposited with the department of trade and commerce.

The Superintendent of Insurance of the State of New York holds fifty-three millions of dollars of deposits under similar statutes in New York. Such deposits are made by domestic, foreign state and foreign country companies for the benefit of policyholders and creditors. These deposits are carefully guarded



by the statutes. The New York State Courts have held that the courts have no power to distribute or destroy these deposits.

To permit courts, Federal or State, to attach these deposits or to direct the trustee to surrender them to receivers or other trustees would be a destruction of the deposits. This the New York Courts have refused to do.

In *Ruggles v. Chapman*, 59 N. Y., 163, the Court of Appeals in refusing an application to compel the Superintendent of Insurance to turn over to the receiver of an insolvent insurance company securities theretofore deposited with the Superintendent of Insurance, said (page. 164) :

"The securities which the defendant holds were placed in his hands by the insurance company in question in pursuance of the requirements of the law. \* \* \* His duty in respect to such securities is defined by the same statutes. It is there enacted that the Superintendent of the Insurance Department shall hold such securities as security for the policyholders in such companies."

In *Smyth v. Munroe*, 84 N. Y., 354, at page 362, the Court says of the Superintendent of Insurance with reference to such a deposit:

"He holds the securities as trustee for the benefit and for the security of the policyholders under the Act of April 8, 1851. Upon the insolvency of the insurance company and its dissolution and the appointment of a receiver it is his duty to keep those securities, convert them into money and distribute the funds among the *cestui que trusts* \* \* \* but aside from this view, under the statute by virtue of which the Superintendent holds the securities, he is primarily trustee for the policyholders (Laws 1863, Chapter 463, as amended by the Laws of 1862, Chapter 300). The intention of the law evidently was to place

these securities beyond the reach of the companies until the policyholders are fully satisfied and the Superintendent could not be chargeable with the knowledge of the company that usury had been taken even if the proof was clear that such knowledge had existed."

*Lancaster Insurance Co. v. Maxwell*, 131 N. Y., 286, at p. 290.

"It was a trust fund placed in the hands of an official trustee for the benefit of the policyholders in the United States. It was a special security to such persons, and although it might have been taken from the capital of the company, yet when deposited with the official trustee under our own statute, it became a trust fund for specially-named policyholders to which they could resort by virtue of the deposits, and not because it was capital in any sense."

The same is true as to any interest or other income accumulating and retained in the hands of the Superintendent of Insurance.

In *People of the State of New York v. The American, etc., Insurance Co.*, 147 N. Y., 25, in which the Court denied a motion made by a receiver of an insurance company to compel a transfer to him by the Superintendent of Insurance of interest accumulated upon a statutory deposit, the Court held that the interest was a part of a trust fund, saying at page 30:

"We see no reason why the interest must not follow the principal. By Section 14 of the Act the corporation, so long as it shall continue solvent and comply with the laws of the state, shall be permitted by the Superintendent to collect the interest or dividends upon its deposits. This doubtless has reference to a solvent corporation still continuing active business. It has no application to a corpo-

ration that has ceased to exist and has been dissolved by a judgment of the court. Therefore, the Superintendent holds the deposits or securities under the trust created by the statute for the benefit of the policyholders and as such is entitled to collect the interest thereafter accruing and treat it as a part and parcel of the trust in his hands."

But even if we were to assume that the trust established was in the nature of a private or contractual trust instead of a statutory trust, this would not affect the issues arising herein.

*In the Matter of Home Provident, etc., Association*, 129 N. Y., 288, it appeared that in 1884 the Association, an insurance company, entered into an agreeemnt with The Farmers' Loan and Trust Company by which it agreed to deposit certain moneys with that company as trustee for the purpose of creating a safety fund for the benefit of the holders of its certificates of membership, and it was held that the receiver of the association was not entitled to a transfer of such fund from the trustee, the *cestui que trusts* having the same vested interest in the fund as policyholders have in funds deposited with the Superintendent of Insurance pursuant to the statute. The Court said, at page 295:

"I see nowhere any authority in the court to itself take possession of the fund with the payment of which the trustee was itself charged under and by virtue of a valid contract, the obligations of which still remained as against the trustee. Certainly, the right of the trustee to retain its possession is as strong where founded upon a valid contract as in the case of a trustee created by statute."

The Court then proceeded to discuss a number of cases involving deposits made under Section 71 of the Insurance Law, after which it was said, at page 299:

"In each case that of the official trustee and that of the trustee by virtue of the contract, the fund placed with such trustee as security was the property of the insurance company so depositing it, but in both cases it was subject to the trust created, the one by statute and the other by agreement; and I do not see that the court has more power in the case of the trustee by contract than it has in the case of the official trustee, to take from the possession of the former securities placed with it by virtue of a valid agreement which it had entered into with an insurance company subsequently dissolved by the court."

The orders of the Federal courts not only enjoin the Department of Trade and Commerce from disposing of property, but directs the Department to hold all property and records "subject to the further order of the United States District Court for the District of Minnesota, Fourth Division" (Record, 467, p. 56). This not only interferes with the possession and control of the Department of Trade and its statutory authority to conduct the business, but effectively takes out of his hands all property, including the deposit, and prevents the Department from dealing with them in the manner prescribed by the Legislature. This cannot lawfully be done in New York, and the Court of Appeals has repeatedly so ruled.

*Ruggles v. Chapman*, 59 N. Y., 163. In this case it appeared that the plaintiff was appointed receiver of the Eclectic Life Insurance Company, a domestic corporation, in an action brought by a creditor and stockholder, under the Revised Statutes, for the purpose of dissolving the corporation and winding up its affairs on the ground of insolvency. The company had theretofore deposited with the defendant, the State Superintendent of Insurance, under Section 6 of the Insurance Law of 1853, securities to the amount of \$101,000. The plaintiff demanded the transfer and delivery to himself of these securities. At the time

the deposit was made and at the time of the decision of the case (1874), Section 63 and Section 104 of the Insurance Law had not been enacted, but the law provided (Chapter 463 of the Laws of 1853, Section 17, that whenever it should appear to the Comptroller (for whom later the Superintendent of Insurance was substituted) from an examination of an insurance corporation, that its assets were insufficient to reinsure its outstanding risks, he should communicate the fact to the Attorney General, whose duty it should then become to apply to the Supreme Court for an order to show cause why the business of the company should not be closed and that the Court should thereupon proceed to hear the allegations and proofs of the parties, and in case it should appear to the satisfaction of the Court that the assets and funds of the company were not sufficient to reinsure its outstanding risks, the Court should decree a dissolution of the company *"and a distribution of its effects, including the securities deposited in the hands of the Comptroller"* (Superintendent of Insurance). The Court held that it had no power to direct the transfer to the receiver, and said, pp. 164-165:

"The plaintiff is a receiver appointed by the New York Common Pleas, in the exercise of its equitable jurisdiction, at the suit of a stockholder and creditor of the Ecclectic Life Insurance Company, in a suit to establish its insolvency, and procure its dissolution, and the distribution of its assets. The securities which the defendant holds, were placed in his hands by the insurance company in question, in pursuance of the requirements of the law. (4 Edm. Stat. at Large, 218, §6.) *His duty in respect to such securities is defined by the same statute.* It is there enacted that the superintendent of the insurance department shall hold such securities, as security for policyholders in said companies. By a subsequent section of the same act (§17, pp. 224, 225), it is made the duty of the attorney-general, *under specified circumstances*, to apply

to the Supreme Court for the dissolution of the company and the distribution of its assets, including the securities deposited as aforesaid. The Supreme Court, in case it is made to appear that the assets and funds of the company are insufficient to reinsure the outstanding risks, is required to decree the dissolution and distribution as before mentioned. \* \* \* We do not perceive the authority of such receiver to require from the superintendent of the insurance department the surrender of a trust which has been devolved upon him by law. We are entirely clear that the superintendent could not voluntarily transfer the trust, and *we are at a loss to find any authority in the courts to compel him to do so.* \* \* \* It is obvious that there are difficulties in the way of harmonizing these two independent schemes of dealing with insolvent insurance companies; but we are of opinion that the claims of the receiver *cannot be asserted as paramount to the statutory duty of the superintendent.* We venture to add that it is better that the legislative power should be invoked to resolve the difficulty, and to provide for the protection of the rights of the parties interested in such cases by general laws than that the courts should attempt to build up a system out of the discordant and scanty material of positive enactments now to be found in the statutes." (Italics ours.)

It will be observed that in this case the receiver who applied for a transfer of the fund was a receiver of *the New York court* appointed pursuant to the general laws of the State, but that nevertheless the court found itself without jurisdiction to direct a distribution of the fund, except in the special manner and in the course of the special proceedings prescribed by the statute. If the court could not in that case direct a transfer of the fund to its *own* receiver, how can it be contended that in the case at bar it is entitled to direct a transfer to the receiver of a *foreign* court before it has been liquidated according to statutory requirements?



*Ruggles v. Chapman*, 64 N. Y., 557, represented a second attempt made by the same receiver of the Eclectic Insurance Company to obtain a transfer of the same securities from the Superintendent of Insurance. It was a mandamus proceeding and was brought because of the enactment in Chapter 337 of the Laws of 1875 of special legislation pertaining to this insurance company. The Act referred to was passed "to facilitate the distribution of the property and effects" of the company. In the first section of the Act after a recital of the dissolution of the company and the appointment of a receiver it was provided that the Attorney-General might apply to the court for an order directing the distribution of the securities, money, etc., belonging to or deposited by the company with the Insurance Department and authorized the court upon the report of a referee to be appointed for that purpose to direct that the securities be distributed among the policyholders as their rights might be determined, the residue if any to be distributed to and among the other persons having legal rights therein as the same might be established. The second section declared that upon such order being entered, certified and served on the Superintendent, he was authorized and directed to assign, transfer and deliver the securities, etc., or otherwise dispose of the same as he might be directed by the order.

It was supposed by the plaintiff that this special legislation had enabled the court to direct the transfer of the securities from the Superintendent of Insurance to the plaintiff, but the court construed the statute strictly and again refused to make the transfer, saying at pages 560-561:

"The act is carefully guarded, and evidently was designed to protect the rights of policyholders in the disposition of the securities and the distribution of the avails which might be realized.

"The first section of the act provides for a distribution



among the policyholders first, evidently having in view the protection of the interests of these parties. *This distribution cannot take place until the securities are collected and the money received*, so as to make a proper division of the proceeds, ratably, according to the several interests of the policyholders and others. An absolute transfer of the securities to the receiver would prevent the distribution among the persons mentioned until they had been collected by him, and hence this officer would make the distribution, and not the superintendent, as appears to have been contemplated by the act. Although the second section of the act authorizes an assignment, transfer and delivery of such securities, money and property, I think that it was not intended to direct the superintendent to deliver the securities themselves to the receiver, and thus place the distribution in his hands, but to dispose of them, by assignment or otherwise, for the purpose of realizing the amounts thereof and to distribute the money, ratably, according to law, among those entitled thereto.

"The transfer of the securities from the superintendent to the receiver, that he may collect and deposit the proceeds with the Union Trust Company, as the order directs, is not contemplated by the act in question or authorized by its requirements. . . .

"The retention of the securities and property, and the collection and distribution of the avails when realized is more consistent with the provisions of the act of 1853, by which *the good faith of the State is pledged that this officer should hold the fund for the benefit of the policyholders*, without its being subject to the hazard and expense of a transfer to a receiver. Such a contingency is provided for by the first section of the act, which limits the distribution among the policyholders, as their rights are determined by the court. As yet there has been no such adjudication and no order directing any such distribution." (Italics ours.)

*Matter of Guardian Mutual Life Insurance Company, 13 Hun,*

115. This case arose upon an application by a receiver of a number of life insurance companies to compel the Superintendent of Insurance to turn over to him securities deposited under Section 6 of Chapter 463 of the Laws of 1853. The case differed from the *Ruggles* cases in one essential point, namely, that in the *Ruggles* cases the plaintiff had been appointed receiver under the general laws of the State, while in this case he had been appointed receiver in the special proceedings authorized by Section 17 of this same act of 1853, which provided, as we have already seen, that where an insurance company had been shown in an application by the Attorney General at the instance of the Superintendent of Insurance to be in an unsafe condition the Court should decree a dissolution of the company and a distribution of its effects, including the *securities deposited in the hands of the Comptroller* (Superintendent of Insurance). It was contended by the receiver that since he had been *appointed in this very special proceeding authorized by statute*, the Court had power to turn the securities over to him for distribution, but the Court again denied its power to compel such a transfer, because the Legislature *had not expressly authorized such a transfer by the terms of the statute itself*. The Court said, at page 117:

"It is true that the act of 1853 gives the Supreme Court power to decree a distribution of these securities. That provision means a distribution to those who are entitled as policyholders or otherwise. There is no necessity whatever, in order to carry out such distribution, that the securities should be removed from the present lawful custodian. If the court could decree a distribution, in case the securities were in the hands of a receiver, they can decree the same distribution by the superintendent. All of the questions which are said to be intricate can be determined on the application of the superintendent, or of

the parties interested, or in some proper form, as well if the securities remain where they are, as if they should be put in a receiver's hands.

"We see no authority in the Court to take the property out of the hands of the superintendent, who is the official trustee, except by decreeing a distribution."

The case was affirmed, without opinion, by the Court of Appeals in 74 N. Y., 617.

It may be argued that because the Court said in the case last cited that it had jurisdiction to order a distribution of the funds by the Superintendent of Insurance, it follows that this Court likewise has the power to order a distribution by the Superintendent of Insurance under the present law. It should be noted, however, that since the decision of this case the statutes on the subject have been changed so that the policy of the Legislature is now the reverse of what it was when that case was decided. The Court has no authority whatsoever to direct the Department of Trade of Nebraska to distribute the fund to any one else, least of all to a receiver of a foreign State.

How strictly bound the courts of this State regard themselves by legislation of this character is also illustrated by the case of *Attorney General v. North American Life Insurance Company*, 85 N. Y., 485. This case involved another section of the Insurance Law relating to special deposits with the Superintendent of Insurance for the benefit of registered policies. Chapter 902 of the laws of 1869 required the Superintendent of Insurance upon the insolvency of an insurance company and the appointment of a receiver to convert the deposited securities into money and to pay over the proceeds to the receiver, who was thereupon to apply such proceeds to the payment of registered policies. It was further provided that any surplus remaining "with all the other assets of the said company shall then be applied to the

payment of all the just debts of the company." The Court held that this mode of distribution must be strictly complied with, saying at page 487:

"The distribution of the special fund deposited for the benefit of registered policies *is to be controlled by the statute rather than any general rules of equity*. The latter may help our judgment, but cannot displace the terms of an express trust, or of a specific enactment. The issue, protection and ultimate payment of registered policies is regulated by statute. (Laws of 1869, Chap. 902.) It *dictates the proceedings* in cases of insolvency, and defines very clearly the duty of the superintendent and the receiver. The former is required to convert the securities deposited into money, and pay over the proceeds to the latter, who is thereupon to apply such proceeds to the payment of registered policies and annuities in proportion to their net value. The statute further provides that any surplus remaining, if any there be, 'with all the other assets of the said company, shall be *then* applied to the payment of all the just debts of said company.' The purpose of this provision is quite plain."

**POINT V.**

**Neither the Department of Trade and Commerce of the State of Nebraska nor the Courts have any power to extinguish property rights of the policyholders in the deposit made by the Lion Bonding & Surety Company with the Department of Trade and Commerce.**

It is well settled law that the rights of the *cestui que* in valid and irrevocable trusts, whether statutory or private, cannot be destroyed by the settlers of the trust or by the trustee.

*Lovell v. St. Louis Mutual Life Ins. Co.*, 110 U. S., 264. In this case it appeared that the complainant was a policyholder in the St. Louis Mutual Life Insurance Company. This Company had deposited with the Treasurer of the State of Tennessee (of which the complainant was a citizen) \$20,000 of State bonds, the property of the insurance company, to be held under the laws of Tennessee as indemnity against loss to citizens of Tennessee on life policies such as that of complainant.

The St. Louis Mutual Life Insurance Company, having become greatly embarrassed, the Superintendent of the Insurance Department of the State of Missouri filed a petition with the Circuit Court of Missouri and obtained an injunction against its carrying on any further business. The Superintendent also procured an order from the Court directing the St. Louis Company to transfer to the Mound City Insurance Company all of its assets, wherever situated, in consideration of the re-insurance by the latter of the insolvent company's risks, the re-insurance scheme providing for a surrender by assenting policyholders of their policies to the re-insuring company in return for policies issued by the latter. A very large majority of the St. Louis Company policyholders assented to the plan and surrendered

their policies, but the complainant did not assent to the plan, and brought this action, among other things, to attach the fund deposited with the Treasurer of the State of Tennessee and for an injunction to hold the fund subject to the orders of the Court until the complainant's claim should be satisfied. The Supreme Court held that notwithstanding the fact that the St. Louis Company had transferred all its assets to the re-insuring company pursuant to the order of the Court, the complainant nevertheless had a right to payment out of the State fund, saying at page 274:

"To this fund the complainant, being a citizen of Tennessee, had a right to resort. The object of the laws of Tennessee in requiring the fund to be placed on deposit with the Treasurer was to protect and indemnify its own citizens in their dealings with the company. The assignment to the new company in Missouri could not deprive them of the right to this indemnity."

In *People v. Empire Mutual Life Ins. Co.*, 92 N. Y., 105, it was held that where the E Life Insurance Company entered into a contract with the C Life Insurance Company by which the latter agreed to insure the outstanding risks of the former for a sum specified, and transferred all of its assets to the C Company and surrendered its offices and thereafter was dissolved, policyholders who refused or neglected to accept new policies from the C Company still remained beneficiaries of the fund held by the State as security for them.

*Hayne v. Metropolitan Trust Co.*, 67 Minn., 245. An insurance company assigned to and deposited with the Insurance Commissioner of Minnesota certain securities in trust for the benefit of its policyholders pursuant to a Minnesota statute. Subsequently the insurance company and the defendant trust company made an arrangement by which the former assigned to the



latter these securities in exchange for other securities. The two companies then procured from the Insurance Commissioner a re-transfer and surrender of the securities deposited with him, the insurance company substituting in place of them (but of much less value) part of the securities which it had received from the trust company, and the trust company depositing with the State Auditor in trust for itself the securities thus surrendered by the Insurance Commissioner. The surrender by the Insurance Commissioner of the securities deposited with him and the substitution of others in their place was without the knowledge of the policyholders and without the knowledge or approval of the State Treasurer. In an action brought in behalf of all the policyholders of the insurance company for the purpose of administering and distributing the proceeds of all securities deposited with the Insurance Commissioner in trust for their benefit, the plaintiff was appointed receiver and he brought this action against the trust company and the State Auditor to compel the delivery to him of the securities withdrawn from the Insurance Commissioner. It was held that the Insurance Commissioner had no authority to transfer, surrender or exchange securities deposited with him in trust for policyholders without the approval of the State Treasurer, and then only in the cases and in the manner provided by the statute, and that the attempted transfer and surrender by him *was not merely voidable but absolutely void*. The Court said at page 249:

"The policy holders of the insurance company were the beneficiaries of the trust, and, to the extent necessary to satisfy their policies, were the equitable owners of the Maxey note and mortgage. They never consented to the exchange of securities. The insurance commissioner had no authority to consent to any exchange, or to surrender the trust property, except with the consent and approval



of the state treasurer, expressed in the manner provided by statute. (G. S. 1894, §3155.) He was merely the custodian of the property, vested with the bare legal title in trust for the policy holder. The trust company had or was chargeable with notice of these facts. \* \* \*

"The policy holders were no parties to the arrangement by which the two companies exchanged securities and secured the surrender of their trust fund by the insurance commissioner, and the acceptance by him of something else in its place."

## POINT VI.

The statute involved has given to the insuring public an economical and expeditious system of governmental control over delinquent and insolvent insurance companies and their affairs, and those who deal with corporations organized under such laws are entitled to receive the benefit of the statute. The Federal Courts have no power to destroy those rights by injunction or otherwise.

The high expenses of Federal bankruptcy proceedings and the low returns to creditors is a matter of common knowledge. Recently the New York Journal of Commerce and Commercial Bulletin, a daily journal devoted to publishing commercial data and news, contained the following editorial, issue of December 19, 1922:

### "REFORMING THE BANKRUPTCY LAW.

"It is a strong and laudable position that the Merchants' Association has taken with regard to sundry abuses now common under our existing bankruptcy law. The fact is common knowledge that costs of liquidating the bankrupt in this country are extremely excessive. What with the numerous and usually unduly large fees to lawyers, more often than not really needless, creditors rarely get anything like what they should, and often get nothing.

"Just what is the proper remedy is another question. It ought not, however, to be particularly difficult to devise a better system than that we now have. Much, no doubt, could be learned from the methods and procedure now in use in this State in the liquidation of insurance companies. That system now functions admirably, holding the costs of closing out the affairs of liquidating firms to a mere fraction of those common in bankruptcy proceedings un-

der the Federal Bankruptcy act. If the committee soon to be appointed by the Merchants' Association to study the subject is able to bring sound, constructive suggestions to the attention of the community it will have rendered a noteworthy service."

Under the New York statute no fees or commissions are allowed to the liquidator. The Superintendent is the liquidator and receives from the state a salary of \$10,000 a year, which is declared to be in full of all services performed by him in any capacity (Sec. 2, Insurance Law). This eliminates a large item which is allowed in bankruptcy proceedings.

The Superintendent has the power to act without first getting the approval of the court. This does away with expensive court procedure. Many proceedings are conducted at the same time by one force of assistants. This saves expenses of separate forces for each company which was the case in receiverships. The Superintendent can conduct a business and reorganize or rehabilitate it. This was not permissible under the limited powers of receivers.

The various beneficial and economical results obtained from the numerous proceedings under the New York statute and the development of the law are described in the annual reports of the Superintendent of Insurance.

Excerpts from these reports in so far as they relate to delinquent companies are annexed hereto in Appendix B, and a reference to them will show the various things which can be done under the statute, and the beneficial and economical results obtained.

The public records show that New York liquidations under Section 63 have more than accomplished the expectations of the Legislature. The Sixty-second Annual Report of the Superintendent of Insurance shows that up to December 31st, 1920, proceedings to liquidate sixty-two companies had been completed

under Section 63, and the expenses of liquidation to assets realized is .02554, the expenses of liquidation to total liabilities is .02801, and the expenses of liquidation to assets distributed to members and stockholders is .0154, and that in twenty-six proceedings creditors have been paid in full. (See New York Insurance Report, 1921, Part I, pp. 34, 54-61, inclusive.)

All persons dealing with New York and Nebraska insurance corporations are charged with notice of these charter rights, and all persons interested in the affairs of the corporation can insist they shall be regarded. *Relfe v. Rundle, supra.*

The Federal courts of Minnesota cannot deprive the citizens of Nebraska and New York of the advantages which the economical State laws give over the expensive and cumbersome Federal receiverships. The papers in these cases show that many suits have been brought in various States by the Minnesota receivers to recover the assets at undoubtedly an enormous expense.

If the rule of comity had been applied as the New York Court of Appeals applied it in *Martyne v. Am. U. F. Ins. Co.*, 216 N. Y., 183, and in *Parsons v. Charter Oak L. Ins. Co.*, 31 Fed., 305, these expenses would have been saved for the policyholders.

## POINT VII.

**The relief prayed for in the brief of petitioners (Point XIV) should be granted.**

Respectfully submitted,

FRANCIS R. STODDARD, JR.,  
Superintendent of Insurance  
of the State of New York,  
appearing *amicus curiae*.

CLARENCE C. FOWLER,  
Counsel for New York Superintendent.

**APPENDIX A.**

**New York Insurance Law Relating to Delinquent Insurers, Being Chapter 300, Laws of 1909,  
Chapter 33 of 1909, Chapter 28  
of the Consolidated Laws.**

**§ 63. Proceedings against and liquidation of delinquent insurance corporations.**

This section shall apply to all corporations, associations, societies and orders to which any article of this chapter is applicable, and to all corporations, associations, societies and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words "corporation" or "corporations" herein shall also include all such associations, societies and orders as well as all voluntary or unincorporated associations.

1. Whenever any domestic corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired; or (d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire

property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h), if such corporation be organized under article five-a, six, seven, eight, ten-a or ten-b of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles respectively; or (i) if such corporation has ceased to transact the business of insurance for a period of one year; or (j) commences voluntary liquidation or dissolution or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs or to dissolve its corporate charter or to procure the appointment of a receiver, custodian or sequestrator under any law except this chapter; or (k) if an application is made for the appointment of a receiver, custodian or sequestrator of the corporation or its property, or a receiver, custodian or sequestrator is appointed by a federal court or such appointment is imminent; or (l) on consent of a majority of the directors, stockholders or members, the superintendent may, the attorney-general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders or the public may require.

2. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable, may, in its or his discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court and such court or the justice of the supreme court before whom such order is returnable may, on such application or at any time thereafter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the possession and control, or the title, rights or interest of the liquidator or the conduct of the business of liquidation; or to prevent waste of the assets or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the corporation or its estate while in the possession and control of the superintendent of insurance or while in liquidation. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct such superintendent, or his successor in office, forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and the conduct of its business.

3. If, on a like application and order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of such superintendent, and his succes-



sors in office, who may deal with the property and business of such corporation in their own names as superintendent or in the name of the corporation, as the court or the justice of the supreme court before whom such order is returnable may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing them to liquidate. The filing or recording of such order in any record office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. The rights and liabilities of any such corporation, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such corporation in the office of the clerk of the county wherein such corporation had its principal office for the transaction of business upon the date of the institution of proceedings under this section.

No claim of any secured creditor or claimant shall be allowed in any proceeding under this section at a sum greater than the difference between the value of the security and the amount for which the claim is valid, unless the creditor or claimant shall surrender his security to the liquidator in which event the creditor or claimant may file a claim and become a claimant for the full amount thereof. No conveyance, assignment or transfer, except to a purchaser for a valuable consideration without notice, of any property of any corporation, association, society or order subject to the provisions of this section by it or by any officer, director, stockholder or member thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director, stockholder or member when the corporation, association, society or order is insolvent or such insolvency is imminent, and within four months prior to the granting of any order to show

cause authorized by this section, with the intent or effect of giving to any creditor, or enabling him to obtain, a greater percentage of his debt than any other creditor of the same class, shall be valid and no such corporation, association, society or order shall make any conveyance, assignment, transfer or encumbrance in contemplation of insolvency or within such period of four months. Every person receiving by means of any such prohibited act or deed any property of the corporation, association, society or order shall be bound to account therefor to the superintendent of insurance as liquidator. Every director or officer of a corporation, association, society or order who shall violate or be concerned in violating any provision of this section shall be personally liable to the creditors, stockholders and members of the corporation, association, society or order of which he shall be a director or an officer to the full extent of any loss they may respectively sustain by such violation and the same may be recovered by the superintendent of insurance as liquidator of such corporation, association, society or order.

4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver or had its property sequestered in its domiciliary state or country or in any other state or country, the superintendent may, the attorney-general representing him, apply to the supreme court or any justice thereof in the judicial district in which such corporation has its principal office for the transaction of business in this state, for an order directing such

corporation to show cause why the superintendent should not take possession of its property and conserve its assets for the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders or the public may require.

5. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable may, in its discretion, issue an injunction restraining such corporation and its officers, agents and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney-general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state.

6. For the purpose of this section, the superintendent shall have power to appoint, under his hand and official seal, one or more special deputy superintendents of insurance, as his agent or agents, and to employ such counsel, clerks and assistants as may

by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The compensation of such special deputy superintendents, counsel, clerks and assistants, and all expenses of taking possession of and conducting the business of liquidating any such corporation shall be fixed by the superintendent, subject to the approval of the court, and shall, on certificate of the superintendent, be paid out of the funds or assets of such corporation. During the progress of any proceedings taken under this section, the superintendent, his deputies or any examiner authorized by him and the special deputy superintendent of insurance acting for the said superintendent therein shall have all the powers given to the superintendent, his deputy or any examiner authorized by him, by section thirty-nine of this chapter, including the power to examine under oath the persons specified in such section, and to compel the production of books and papers as therein provided.

7. For the purposes of this section, the superintendent shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper.

8. The superintendent shall transmit to the legislature, in his annual report, the names of the corporations so taken possession of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policyholders, creditors, stockholders and the public with his proceedings under this section; and, to that end, the special deputy superintendent in charge of any such corporation shall file annually with the superintendent a report of the affairs of such corporation.

9. All acts of the superintendent of insurance in taking or continuing in possession of any property, or in the regulation, conduct or liquidation of the business, of any corporation to

which this section is applicable, since the first day of January, nineteen hundred and nine, whether such taking possession, continuing in possession, regulation, conduct or liquidation was in pursuance of a contract, by mutual consent or otherwise, are hereby ratified, legalized and confirmed.

10. On such application or at any time after the court or a justice thereof shall order the liquidation of the business of any such corporation, as provided in paragraph numbered three of this section, the superintendent of insurance may apply for the dissolution of such corporation, and the same, after due notice and hearing and such other procedure as to the court or justice shall seem proper, shall be dissolved.

11. The order to show cause and the papers upon which the same is made in any proceeding instituted under the provisions of this section shall be served upon the corporation named in such order, if it be a domestic corporation, by delivering to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or manager agent; if it be a foreign corporation, by delivering to the president, vice-president, treasurer or assistant treasurer, secretary or assistant secretary, director or managing agent, or if the corporation lack any of those officers within the state, to the officer performing corresponding functions under another name; if it be a voluntary, unincorporated or a joint stock association, order or society, by delivering to the president, vice-president, treasurer, director, trustee or other officer or a member with managerial powers; if it be a Lloyds association, by delivering to the duly designated attorney-in-fact, a true copy of said order to show cause and the papers upon which it was granted and leaving the same with any such person within the state. When it is satisfactorily proved by the report of an examiner of the insurance

department made in accordance with the provisions of section thirty-nine of this chapter or by affidavit that the officers, directors, trustees or managing agents or members of the corporation, association, order or society named in said order to show cause, upon whom service is required to be made as above provided, or, if a Lloyds association be named in the order to show cause, that the duly designated attorney-in-fact, have departed from the state or keep themselves concealed therein or if such of the persons residing in this state and upon whom service is required to be made as above provided have resigned from their offices within forty days prior to the application for an order to show cause under the provision of this section, or that service cannot be made immediately by the exercise of reasonable diligence, such order to show cause may provide for service thereof in such manner as the court or justice by whom the same is made, shall direct.

12. At any time after the commencement of proceedings under an order of liquidation made pursuant to this section, the said superintendent may remove the principal office of the corporation in liquidation to the county of Albany. In event of such removal the court shall, upon the application of the superintendent, direct the clerk of the county wherein such proceeding was commenced to transmit all of the papers filed therein with such clerk to the clerk of the county of Albany, and the proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county of Albany.

**APPENDIX B.****51st Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1909.****LIQUIDATIONS THEREUNDER.**

Governor Hughes, in his message to the Legislature of 1909, recommended:

"The Superintendent of Insurance should also have authority to conduct the liquidation of insolvent companies in a manner similar to that which has been authorized in the case of banking institutions."

Pursuant to this recommendation, the department brought forward a bill similar to section 18 of the banking law, which section gives the superintendent of banks the power which is possessed by the comptroller of the currency when a national bank is found to be insolvent. Differences between banks and insurance companies suggested, however, that the discretionary power now vested in the superintendent of banks be limited as to the superintendent of insurance by provisions requiring judicial action prior to his taking possession and liquidating. The bill was, in some quarters, looked upon as revolutionary. It may have been so; but it was needed. The necessity for it was emphasized by the narrow escape, brought about largely through the intervention of the department, of the policyholders of the Washington Life Insurance Company from an unnecessary and wasteful receivership. After many conferences, participated in by leading legislators and the representatives of the life and fire companies, the bill was finally perfected, received the ap-



proval of the legislative committees, was passed without objection and became a law on May 7, 1909.

**General Effect of Section 63.**—How far-reaching its mere existence has been, it is possible only to speculate. Facts brought to the attention of the department warrant the statement that, largely because this law was available, among other results, a heavy defalcation in a fraternal beneficiary society was promptly paid; a contingent fee business conducted by a title company, to the detriment of its policyholders and stockholders, has been discontinued; two important investigations of insurance entities, which have hitherto escaped supervision, have been conducted; and an exodus of undesirable citizens who were promoting or seeking to promote unwholesome insurance schemes has set in toward other states not yet possessed of this statutory law. It has vested the department with a sort of police power and permitted a cleaning up, or, rather, a cleaning out, that has long been needed.

**Proceedings to Date.**—Including the liquidation, through reinsurance, of the Washington Life Insurance Company, which was begun before Section 63 became operative, but was by the terms of such section, made legal, the department, in 1909, began proceedings against twenty-four insurance companies under this new law.

**Classification of Companies Liquidated.**—It will be seen, therefore, that, including the Washington Life Insurance case and proceedings begun, but in which orders have not yet been granted, the department has reinsured, is liquidating, or is proceeding toward the liquidation of two life insurance companies, eight co-operative fire insurance companies, three Lloyds associations, three assessment live stock corporations, two life or casualty

corporations operated on the assessment plan, and six fraternal beneficiary societies. Nearly half of the corporations mentioned have consented to or waived notice of the proceedings. Two of the Lloyds proceeded against have contested the right of the department to take possession. The two life companies were reinsured, not only without loss, but, it is thought, with substantial gain to policyholders in each case. The members of the eight co-operative fire companies have responded well to the assessments made, and in two or three of the cases, the department expects to be able to pay loss claimants one hundred cents on the dollar. Two of the fraternal were proceeded against largely because of the character of their methods of business, as was one of the assessment companies. Another of the fraternal practically joined with the department in asking relief from a condition due to inadequate rates. While the fraternal last proceeded against, whose assets are considerable and membership large, in the opinion of the department brought itself within the so-called hazardous clause of section 63, both by reason of its condition and because of what seemed to be an effort of the controlling officers to dispose of such control for their individual profit. The three live stock assessment concerns proceeded against were going the way of all such concerns, and were merely assisted rapidly to their ultimate destination. The department's complete reports will contain details of the administration of all cases begun or completed at the time such reports are printed.

It may, perhaps, be added that, with a sufficient examining force to permit investigations in certain directions, other proceedings of this character are not unlikely. Promoters of unwholesome insurance schemes have too long preyed upon the citizens of New York. The insurance law, itself, has been so phrased or amended as to make certain classes of insurance corporations practically immune from departmental interference or liquidation processes. The reputable and safe need have no concern; others should.

Meanwhile, the people of the state should not accept insurance contracts from companies unknown to them by general reputation, save on application to the department for information concerning the financial standing and reliability of such companies and their officers.

**Expenses of Liquidation.**—It is impossible at this time to furnish any reliable statistics as to the cost of these proceedings. The only one completed is the legalized trusteeship of the Washington Life Insurance Company. The total cost of this trusteeship, consisting almost wholly of the salaries and expenses of the two examiners in charge, was less than \$4,500. Special deputy superintendents liquidating the other pending proceedings are, with a single exception, regular deputies or examiners of the department, and a pro rata portion of their salaries is, where possible, charged against the trust and thus returned to the state treasury. The single exception mentioned is that of the eight co-operative fire insurance companies, where one of the special counsel to the department has been put in charge, on a monthly salary of moderate amount. Thus far, it has not been necessary to employ attorneys, and, where possible, office expenses have been eliminated by conducting administrations from the New York office of the department.

**Dissolutions.**—In addition to the above proceedings under section 63, the attorney-general has been requested to secure the dissolution of the following dormant or defunct insurance corporations, viz.:

"American Casualty Insurance Company of Oneonta, New York," Buffalo, N. Y., July 10, 1909.

"National Relief Assurance Association," New York City, July 10, 1909.

Both of these corporations were doing the business of assessment, life and casualty insurance as provided for in Article VI of the insurance law. As section 63 now stands, it will be necessary for the attorney-general to take similar proceedings against insurance corporations now being or hereafter to be liquidated.

*Recommendations.*—In connection with this general subject, the department makes the following recommendations:

(1) That there be established in the department a new bureau, to be known as the liquidation bureau. Under the present law, the great burden of proceedings of this character falls upon the superintendent and the counsel of the department. It is impossible for the former to give a proper amount of attention to other and pressing matters, if he must, in effect, become an active liquidator at large for insurance entities of all complexions and sizes. The same is equally true of the counsel of the department. It has been thought possible to discover and educate expert liquidators, like the regular receivers employed by the comptroller of the currency, and this work has already been begun. The routine work of administration, however, will not be conducted properly unless there is in the department a bureau charged with this sole duty.

(2) Section 63 should be amended so as to provide for the dissolution of a liquidated corporation at the end or as a part of the liquidation proceeding, itself. Otherwise, at the end of the liquidation, there will still remain the hollow shell of a corporation, which can be disposed of only through a formal action to dissolve under the general statutes.

(3) There should be added to section 63, as another

ground on which a proceeding under it may be initiated, a clause which shall express substantially the following idea: "Whenever, because of a reduction in membership or of the amount of insurance in force, or otherwise, its condition at such time is such that it could not lawfully apply for authority to commence business." Certain assessment associations and fraternal beneficiary societies are now authorized to do business in New York whose membership and condition have fallen below the requirements necessary as a condition precedent to beginning business and yet, which cannot be reached with certainty by section 63, even under the so-called hazardous clause.

**52nd Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1910.**

**LIQUIDATIONS.**

The experience of the year continues to demonstrate the wisdom of the legislature of 1909 in adding Sec. 63—the liquidation section—to the insurance law. Thus far, proceedings have been instituted against thirty insurance corporations or associations. In one case, on a reorganization being effected and the placing in the hands of the department of funds sufficient to pay all known and admitted liabilities, an order discontinuing the proceeding was entered. In all other cases the department has either completed the liquidation or is now at work to that end. Of the eighteen proceedings instituted in 1909, ten have been completed and, where assets existed, such assets have been applied to the payment of the liabilities of the respective corporations. The other proceedings are still pending. Of the eleven proceedings instituted in 1910, two have been completed and, where assets existed, distribution made. The other nine are still pending. The corporations proceeded against were one stock life insurance company, one title and guaranty company, three Lloyds associations, eleven co-operative fire insurance companies, three assessment live stock corporations, and nine fraternal. In the ten closed cases two showed no assets, seven yielded funds through the levy and collection of assessments permitting the payment of 100 per cent. to policy claimants, while in one a dividend of about 12 per cent. was paid. The present status of all the liquidation undertaken by the department is indicated in Table F appended hereto.

**Savings in Expense.**—Prior to the organization of the liquida-

tion bureau, members of the examining force were appointed special deputy superintendents in charge of liquidation proceedings. Since the organization of such bureau, either its chief or his assistant has been appointed special deputy in every case. Thus far, practically no expense has been incurred for counsel fees; the special deputy superintendent in charge or the department counsel having performed the necessary legal work. The saving to loss claimants through this practice is indicated by the fact that, in liquidating six co-operative fire insurance corporations, which had headquarters at Syracuse, upwards of 1,800 assessment suits were brought in justices' courts in forty different counties, at a total expense of but \$22 for counsel fees.

**Rapidity of Administration.**—Departmental liquidating of decrepit and delinquent insurance corporations has proved quick as well as inexpensive. The first proceeding to be completed—that of the Genesee Valley Fire Insurance Company—required less than five months, within which time the condition of the corporation was ascertained, the losses and expenses of the company were apportioned among its members by the levy and collection of an assessment, involving the calculation and credit to all policyholders of the unearned premiums upon their respective policies, some 250 actions were brought against delinquent policyholders to compel the payment of assessments, the debts of the corporation, amounting to \$7,119.56, were paid in full with interest, and a surplus distributed among the policyholders who had responded to the assessment call. The Otego Town Fire Insurance Company was completely liquidated, by the full payment of an indebtedness of \$2,678.12 in less than eleven weeks.

**Important Liquidation Still Pending.**—Several important liquidations are still under way. That of the Union Life Insurance Company has been delayed by litigated matters affecting antagon-



istic rights of policyholders and stockholders. The liquidation of the Title and Guarantee Company of Rochester has just begun, but is already involved in controversies growing out of the manipulations of Joseph G. Robin, which will probably delay a final distribution for some time.

**Peoples Mutual Liquidation.**—In the Peoples Mutual Life Insurance Association and League, where the book value of the assets approximated \$3,000,000 and the certificate holders numbered more than 38,000, a sufficient sum has been realized upon the securities to permit the payment of a 60 per cent. first dividend, and work will shortly be begun upon the distribution of a second dividend. While there will be a considerable shrinkage in assets, due to bad investments made by the officers of this society, it seems now reasonably certain that the certificate holders will ultimately receive upwards of 90 per cent. of the monthly dues paid by them to the society. This liquidation resulted from an investigation, begun on December 24, 1909, of a rumored transfer of the control of this society, which investigation shortly disclosed a bargain between its trustees and one Tevis, whereby, for the consideration of upwards of \$100,000, a majority of the board resigned and friends of Tevis, who had in no way been connected with the society, were elected in their stead—the control of this so-called fraternity thus being transferred over night to strangers. The department promptly applied for the liquidation of the society, and, with the aid of the Attorney-General, was able to secure the repayment into its treasury of the sum of \$150,000, which was the amount involved in this illegal transaction. This case attracted much public attention, and the secretary of the society was subsequently indicted by the Onondaga county grand jury and later convicted for perjury in connection with his examination by one of the department's examiners.

**Far-reaching Effect of Sec. 63.**—No reference to this new method of winding up insurance corporations should omit comment on its far-reaching effect in cases where no application to court has been found necessary. Knowledge that the power to proceed against, take possession of, and liquidate any insurance entity whose condition, after examination, should be found hazardous to its policyholders, its creditors or the public, is constantly before executive officers who may attempt so to manage their trusts as to make departmental intervention likely. Indeed, it is thought that this silent force has done more toward cleaning up and compelling a proper observance of the law and that desirable conservation of resources demanded by the public than even the investigations and proceedings here detailed.

**53rd Annual Report of the Superintendent of Insurance,  
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Year Ending December 31, 1911.**

**LIQUIDATIONS.**

Table D, hereto annexed, indicates briefly the work done by the department in the liquidation of insurance companies and societies since the enactment of section sixty-three by the Legislature of 1909.

**Section Sixty-three.**—This section, which was the first of its kind in the country affecting the business of insurance and which has now been enacted into the laws of several of the states, operates in three very noticeable ways. It permits the wiping out of dormant or dying insurance companies with some celerity and at little cost, and thus limits the operations of certain individuals who, in the past, made a business of buying up or selling dormant licenses granted by sovereignty. It makes it possible, without the waste and extravagance which have characterized insurance receiverships, to wind up failing or failed companies or societies of considerable size, with results as indicated in the People's Mutual case, later mentioned. It justly threatens with its drastic and summary process company officers and administrators who or which are either faithless or carelessly inefficient, and thus places an added guarantee—as it were the seal of the State—upon companies which continue in business.

**Liquidations in 1911.**—As was to be expected, the field having been somewhat cleaned up in the first two years, the new liquidations for the year just closed have been fewer in number than in any previous year. Save that of the Title & Guaranty Company of Rochester, which in effect began with the calendar year,

none of them can be considered important. The work of the liquidation bureau has been largely devoted to the winding up of certain old cases and the further administration of certain important cases pending a year ago. It has been found possible to discontinue the New York branch of the bureau and thus to centralize new and pending liquidations in the office maintained at Albany; the chief of the bureau appointed special deputy superintendent for the liquidation of each case.

**General Conditions.**—As will appear from the table, the department has, in a little less than three years, pursuant to the authority given it by section sixty-three, and to the complete exclusion of insurance receiverships—save in a single case, where policyholders and the public were not interested—proceeded against forty corporations engaged in the business of insurance in this State. These proceedings were directed against three stock life insurance companies, eleven town and county co-operative fire insurance associations, eleven fraternal benefit societies, five co-operative live stock associations, two assessment life and casualty companies, four Lloyds, one title insurance company, one business and two membership corporations. Of the forty proceeded against, two paid up their obligations in full and were released from the custody of the department. Of the remainder, twenty-three have been closed and fifteen are still pending. In ten proceedings which have been completed, the department was able to pay all outstanding liabilities in full, from the proceeds of assessments levied upon and collected from policyholders; in two other cases funds were similarly raised sufficient to pay over 96 per cent. In the other cases the assets of the corporation concerned were distributed among the persons entitled at a minimum of expense and the corporations dissolved, so that they might not be further employed to the detriment of the insuring public. Save in rare instances it has not been neces-

sary to employ outside counsel. Instead of generous receivership fees, the liquidators have been salaried employes of the State. Delays, incident to controverted matters in courts, have been unavoidable; but, in a very large number of the liquidations undertaken, collection and distribution, followed by final orders, have been made within a few months after the department took charge.

These facts were somewhat referred to in the report of 1911, but are here again reviewed to give added emphasis to the great gain to the people at large and to the policyholders and reliable insurance companies, as well, which has come from this new departure in our insurance jurisprudence.

**People's Mutual Life Insurance Association and League.**—During 1911 a second dividend in this important case was declared and paid. It is worthy of note that the first dividend of 60% resulting in the distribution of upwards of \$2,200,000, to nearly 37,000 certificate holders, was made at a total expenditure of \$17,834.88, or at the rate of less than one per cent. of the assets so distributed; that this expenditure was made largely in payment of clerks and for postage and printing; and that the only disbursement for legal fees in the case, up to the time of the first dividend, consisted of a disbursement of \$38, in connection with an action brought in the State of West Virginia. The second dividend, of 25%—the distribution of which began in August last—resulted in a payment to the same certificate holders of about \$850,000; and while, owing to the contested legal matters, it has become necessary to employ outside counsel, it is expected that the total distribution in this society will be carried through at a cost to its certificate holders of less than two per cent. of the moneys distributed. The final dividend, dependent in point of time upon both litigation and the securities market—the remaining securities being, to an extent, now marketable

only at considerable loss—will probably be carried through in the current year and result in an aggregate payment of from ninety-three to ninety-four per cent. on all claims. This case is by far the most important to which section sixty-three has been applied, and the results therein are, therefore, here referred to somewhat in detail.

**Liquidation of United States Branches of Foreign Companies; With Ancillary Liquidations of Other State Companies Authorized in New York.**—At present, all insurance corporations and societies doing business in New York, other than those incorporated under the laws of other States and the so-called United States Branches of foreign insurance companies, are amenable to liquidation process, under section sixty-three. Sixty-three of these United States Branches, having their principal offices in New York, also have deposit securities with the department, these being held for the benefit of all policyholders in the United States. Most, if not all, of them also have large sums on deposit with so-called American trustees, usually residents of New York. It would seem to follow, therefore, that section sixty-three should apply to such United States Branches. Similarly, in case of receiverships or liquidations in other States of their companies authorized here. It should not be necessary in insurance cases to resort to ancillary receivership practice in the State of New York. Section sixty-three should be changed accordingly.

**Legislation of 1911.**—Table E, hereto annexed, sets forth the history and purpose, as well as the origin, of the various bills introduced in the Legislature of 1911 which have become laws; it also gives similar facts about bills affecting insurance which, though introduced, did not receive complete legislative or executive approval.

**57th Annual Report of the Superintendent of Insurance,  
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Year Ending December 31, 1915.**

**LIQUIDATION PROCEEDINGS.**

The signal success and great public good achieved by this department during the past six years in winding up the business and distributing in an economical manner the assets of insolvent insurance corporations deserves note. A list of proceedings undertaken, with a synopsis of the work done in each proceeding and its present status is given in Table E hereto appended. All told, fifty-eight corporations have passed into the Liquidation Bureau. They have varied in size and importance from an insignificant co-operative live stock company with neither assets nor records, whose charter, in irresponsible hands, was a public menace, to a large fraternal order, having assets aggregating more than three millions of dollars and a membership of thirty-eight thousand in danger of losing their hard-earned saving through the improvidence of incompetent managers. Every variety of corporation and practically every line of business recognized by the insurance law is represented in the departmental liquidations and funds amounting to a total of \$6,018,540.33 have been administered at a total expense to date for all purposes of \$149,216.39—less than 2½ per cent. of the sum involved.



**58th Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1916.**

**LIQUIDATIONS.**

Since the enactment of section 63 of the Insurance Law (Chapter 300, Laws of 1909) and the establishment in the Insurance Department of a bureau for the liquidation of delinquent and moribund insurance corporations thereunder, the business of sixty-one corporations has been taken over by this Department. The names of all of the corporations, numbering forty-eight, whose business has been completely liquidated, together with particulars as to the dates of the commencement and completion of the several liquidation proceedings, the amounts of the assets and liabilities of the respective corporations, and the dividends paid to their creditors and stockholders or members, are set forth in Part 1 of Table "E" herewith submitted. The names of all of the corporations, numbering thirteen, whose business is not yet completely liquidated, with like particulars, are set forth in Part 2 of said table. Part 3 of said table contains lists of liquidated corporations on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders or members, and the amounts of such funds. List (a) consists of corporations which have been liquidated by this Department. List (b) consists of corporations which were liquidated by receivers appointed prior to the enactment of the Liquidation Law, by whom balances consisting of unclaimed dividends were turned over to this department, from time to time, by orders of the courts appointing such receivers. The amounts of the several funds are set forth opposite the names of the respective corporations. Payments of unclaimed dividends included in these funds are being made, from time to time, as the identity of the persons entitled is established. Meanwhile, the funds, except in those cases where the amounts are too small to be entitled to interest, are drawing interest, which is added to the principal of the respective funds.

**59th Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1917.**

**LIQUIDATIONS.**

During the calendar year, proceedings have been instituted under the provisions of section 63 of the Insurance Law for the liquidation of five delinquent insurance companies, including one legal reserve life insurance company, one surety, casualty and liability insurance company, two fraternal orders, one assessment, life, health and accident association. During the same period the liquidation of three corporations which had previously been undertaken was completed. The total number of liquidations under this Statute since its enactment in 1909 is sixty-six. The names of all of the corporations whose business has been completely liquidated, together with particulars as to the dates of the commencement and completion of the several liquidation proceedings, the amounts of the assets and liabilities of the respective corporations, and the dividends paid to their creditors and stockholders or members, are set forth in part 1 of table "E" herewith submitted. The names of all of the corporations whose business is not yet completely liquidated with like particulars, are set forth in part 2 of said table. Part 3 of said table contains lists of liquidated corporations on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders or members, and the amounts of such funds. List (a) consists of corporations which have been liquidated by this Department. List (b) consists of corporations which were liquidated by receivers appointed prior to the enactment of the Liquidation Law, by whom balances consisting of unclaimed dividends were turned over

to this Department, from time to time, by orders of the courts appointing such receivers. The amounts of the several funds are set forth opposite the names of the respective corporations. Payments of unclaimed dividends included in these funds are being made, from time to time, as the identity of the persons entitled is established. The funds have been kept on deposit in various banks and have been drawing interest except in those cases in which the amounts are too small to earn interest. The interest earned is added to the principal of the respective funds.

In a number of cases where the funds had remained inactive for several years, the greater part of such funds have lately been invested in United States government bonds of the issue of 1917, commonly known as "Second Liberty Loan Bonds," pursuant to permission and authority granted to me by the Supreme Court having jurisdiction of the funds in October, 1917. As a result thereof, the amounts so invested are earning a higher rate of interest than theretofore. The small balances of the funds so invested are earning interest except in cases in which the amounts are too small to earn interest. These small balances, however, will be available forthwith to pay small claims as the identity of claimants are established without disturbing the amounts invested in Liberty Loan Bonds.

Experience has shown the necessity for an amendment to section 63 of the Insurance Law to add two provisions to those specified in subdivision 1 thereof to read as follows:

"(i) on consent of a majority of the directors, stockholders or members; or (j) if such corporation has ceased to transact the business of insurance for a period of one year."

Furthermore, articles 5A, 10A and 10B, of the Insurance Law, which were enacted after section 63, should be included in paragraph h of subdivision 1, so as to make any corporation

doing business under these articles subject to liquidation if its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such article.

I believe, also, that so far as possible the provisions of the Federal Bankruptcy Law making voidable at the option of the trustee all preferences made to creditors during the four months period prior to bankruptcy, either by transfers or by judgments, should be incorporated into the law of this State and made applicable to insurance corporations in liquidation under Section 63. This seems necessary on account of decisions, which have been rendered by the courts of this State allowing to secured creditors of insolvent insurance corporations far greater rights than are allowed against insolvent persons and corporations in the bankruptcy court.

The latitude of procedure by which applications for the liquidation of corporations under section 63 are authorized should be broadened so as to permit the order to show cause to be heard before a justice of the court before whom it is returnable, so that in case of urgency in counties in which special terms of the Supreme Court are not in continuous session, it may not be necessary to await the convening of a special term in order to place a company in liquidation.

The power of the court to issue injunctions conferred by subdivision 2 of section 63 should be enlarged so as to permit the court or a judge to whom the application is made to issue such other injunctions or orders as may be necessary to prevent interference with the possession and control of the liquidator; the conduct of the liquidation; to prevent the waste of assets and the obtaining of preferences by creditors.

Also section 104 relating to the transfer of deposits by the Superintendent of Insurance to a receiver appointed in an action brought by the attorney-general should be made so as to permit such deposits to be distributed by the Superintendent of Insurance as liquidator under section 63.

**60th Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1918.**

**LIQUIDATIONS.**

During the calendar year, proceedings have been instituted under the provisions of section 63 of the Insurance Law against three insurance corporations.

One proceeding was instituted under subdivision 2 for permission and authority to conduct the business of the corporation. This was a fraternal beneficiary society.

Two proceedings for orders directing liquidation were instituted. One against a co-operative benefit association and the other against a town assessment co-operative fire insurance corporation.

The liquidations of four corporations which previously had been undertaken were completed during the year and much has been accomplished during the year toward the completion of one large and difficult liquidation proceeding in particular, viz., that of The Empire State Surety Company. Every claim which has been filed in the liquidation proceeding of that company has been investigated, examined and presented to the court with recommendation prior to the close of the year.

Proceedings have been instituted under the statute since its enactment in 1909 against sixty-nine corporations.

The names of all of the corporations which have been completely liquidated, and the particulars in relation thereto which include, among other things, the date of the commencement and of the completion of each proceeding, the amount of the assets and liabilities of each of such corporations respectively, and the dividends paid to the creditors, stockholders and members, are set forth in Part 1 of Table "E" herewith submitted.

The names of all the corporations, the liquidations of which have not been completed, with particulars, are set forth in Part 2 of said Table "E."

In Part 2-a of Table "E" is set forth the name of the corporation and particulars in relation to the only proceeding in which the business is being conducted under subdivision 2 of section 63.

Part 3 of said Table "E" is a list of corporations which have been liquidated on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders and members and the amounts of such funds. List "a" contains the names of corporations which have been liquidated by this Department. List "b" contains the names of corporations which have been liquidated by receivers appointed prior to the enactment of section 63 by whom balances consisting of unclaimed dividends were turned over to the Department from time to time by orders of the courts which had appointed such receivers. Opposite the names of the respective corporations are set forth the amounts of the funds. Payments of unclaimed dividends included in these funds are being made from time to time as the identity of each person entitled is established.

In October, 1917, several of the funds were invested in the United States Government bonds of the second issue, commonly known as "Second Liberty Loan Bonds" pursuant to permission and authority granted to me by the courts having jurisdiction of the funds. The funds which have not been so invested are on deposit in banks and have been earning interest except in a few cases in which the amounts are too small to earn interest.

**61st Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1919.**

**LIQUIDATIONS.**

By means of liquidations and proceedings to conduct business under the provisions of section 63 of the Insurance Law of the State much material benefit for the insuring public and policyholders, creditors, members and stockholders of corporate and other insurers was accomplished during the year. The results obtained in proceedings instituted during the year and in others theretofore begun justify the wisdom of the Legislature in providing a procedure for the expeditious acquisition by the Superintendent of Insurance of the assets and business affairs of corporate and other insurers.

On April 20, 1919, I received information that a member of the Polish Union of America had brought an action in the Supreme Court in Erie County, asking for the appointment of a receiver of the Union, the distribution of its assets to its members, and its dissolution. I was requested by members to intercede for the protection of the existing insurance of the members. An examination disclosed the fact that the Polish Union of America was an unincorporated society which had been and was doing a life and accident insurance business in this State without authority and in violation of law. The examination further disclosed that the society had been doing business for twenty-seven years; that its members had been endeavoring to meet the requirements of the insurance laws of this State; that a corporation bearing the same name had been organized under article VII of the Insurance Law of this State, with which it was intended to merge the unincorporated society. The assets of the



unincorporated society were found to be sufficient to warrant submission to the members of a plan of reorganization. An application to the court was made, the attorney-general representing me, and on April 25, 1919, the court made an order directing me to take possession of the property of the society and conduct its business pursuant to section 63 and until further order of the court. Accordingly, I took possession immediately. By actuarial computations based upon the National Fraternal Congress Table of Mortality, with 4 per cent. interest, it was found that, after all debts and liabilities were paid, the society would have assets remaining equal in value to 55 per cent. of the required reserves for the continuance of the insurance of all members. The distributive share of each member in the assets was computed, and the required reserve was determined for each member. A contract was made to transfer to the incorporated union the distributive share of each member who accepted and agreed to make up the 45 per cent. of his reserve by accepting one of four options, any one of which would require the member to make up the balance. The plan was submitted to and approved by the court by an order dated July 14, 1919. A printed copy of the agreement containing the four options, by the acceptance of one of which a member could continue his insurance, was sent to the entire membership of the society, consisting of 17,106 members. At the close of business for the year 13,627 members had accepted the contract. The acceptance by such a high percentage of members of a fraternal organization, which had been in business twenty-seven years on an inadequate rate basis, of a plan which required them to make up 45 per cent. of the required reserves based on the National Congress Table of Mortality, with 4 per cent. interest, is unparalleled in the history of fraternal insurance reorganization. The members were given the opportunity to continue their insurance protection, and in many cases such protection could

not have been secured if the society had been dissolved and the assets distributed in a receivership proceeding. The final closing of the proceeding was prevented by harassing litigation, some of which is still pending, carried on by one or two defeated officers and members who were interested in the receivership proceeding.

On July 18, 1919, the North Penn Bank of Philadelphia suspended payments on account of insolvency. On the same day an examination of the records of the Department disclosed that two of our domestic fire insurance corporations had previously reported money on deposit in the North Penn Bank. A complete examination of such companies was promptly made.

In the case of the New York National Insurance Company it was found that the deposit with the defunct bank amounted to \$229,547.57. The insurance company was directed to make good the deposit. The surety companies on the bonds covering the deposit refused to pay promptly, thereby making it impossible to reinsure outstanding policies, for the other assets were not sufficient to pay for reinsurance. The New York National Insurance Company, having failed to make good the loss and the impairment of its capital, although given a reasonable opportunity to do so, application was made for an order to liquidate the company pursuant to section 63. The order was granted, and I took possession of the company and its assets on August 5, 1919, the liquidation order providing that liability on all outstanding policies would cease and terminate at midnight on August 14, 1919. Notices were promptly mailed to all policyholders advising them of the liquidation order and of the termination of their insurance, so that they might secure protection elsewhere.

In the case of the Seneca Fire Insurance Company, it was found that it had on deposit with the defunct bank, the sum of \$238,162.98. The same officers who had failed to make good the

loss in the New York National case failed again in the case of the Seneca Company. The assets of the company were sufficient to reinsure all outstanding risks. The Department urged the officers to reinsure all the risks, but they failed to do so. The delay became the subject of comment in the public press, and rumor was afloat to the effect that the Seneca Company was insolvent and was unable to pay losses. It was apparent that, unless reinsurance was accomplished immediately, the policyholders would commence cancellation of their policies. Close watch was kept of the efforts of the officers to reinsure, and when it became apparent that they could not effect a reinsurance, application was made to the court for an order to liquidate under section 63. Such an order was granted on August 19, 1919, giving the Superintendent of Insurance power to reinsure and on the same day all outstanding policies of the company were reinsured with the Globe & Rutgers Fire Insurance Company for 76 per cent. of the unearned premiums, thereby making a profit of over \$44,000, which will inure to the loss claimants, creditors and stockholders. Without the rapid procedure provided by section 63, these advantageous results could not have been accomplished.

In September, 1918, it was found upon examination that the National Service Life Society, of Rochester, New York, was insolvent. A liquidation proceeding was commenced, and the court, by order dated September 12, 1919, approved by a contract made with the American Life Society to insure and continue the life insurance of each member until the 31st day of October, 1919, and thereafter to continue such protection for all members accepting insurance with the American Life Society. By such procedure the insurance of the members was continued for a short time until notice could be given so that the members might have an opportunity to obtain other protection. In order to secure the business, the American Life Society paid the sum of

\$1,500 to be applied *pro rata* to the payment of the existing death, sick, accident and surrender value claims.

Before the close of the year a report in the proceeding to liquidate The Empire State Surety Company was filed with the court, in which leave was asked to sell the deposit securities and pay a first dividend upon all claims which had been approved. The report showed that the available assets were sufficient to pay a dividend of 30 per cent. on insurance claims from the trust fund, and 15 per cent. on the unpaid balance of such claims from the general fund, and a dividend of 15 per cent. on general claims from the general fund, notwithstanding that when such company was placed in liquidation, it was thought that no dividend would be paid to policyholders and creditors, on account of the involved condition of the assets and the large amount of unpaid losses.

Altogether seven separate proceedings have been instituted during the year under the provisions of section 63, and one proceeding which previously had been undertaken was completed and closed.

The cemetery rights held by the Independent Order Free Sons of Judah were sold and the last payment of the purchase price received shortly before the close of the year. Efforts to sell a commission contract will be continued so that the proceeding may be closed in a short time.

Much progress was made during the year in collecting assets and determining the liabilities of the Casualty Company of America. The proceeding is a large and cumbersome one and cannot be closed for a year or more.

An appeal taken during the early part of the year from the order directing me to take possession of the property and conduct the business of the Independent Order Sons of Benjamin resulted in unanimous affirmance by the Appellate Division, First Department (187 A. D., 890), and an appeal thereafter taken to the Court of Appeals was dismissed for failure of appellant to file an undertaking.

Proceedings have been instituted under the statute since its enactment in 1909 against seventy-six corporations.

The names of all of the corporations which have been completely liquidated, and the particulars in relation thereto which include, among other things, the date of the commencement and of the completion of each proceeding, the amount of the assets and liabilities of each of such corporations respectively, and the dividends paid to the creditors, stockholders and members, are set forth in Part 1 of Table "E" herewith submitted.

The names of all the corporations, the liquidations of which have not been completed, with particulars, are set forth in Part 2 of said Table "E."

In Part 2-a of Table "E" is set forth the names of the corporations and particulars in relation to the proceedings in which the business is being conducted under subdivision 2 of section 63.

Part 3 of said Table "E" is a list of corporations which have been liquidated on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders and members and the amounts of such funds. List "a" contains the names of corporations which have been liquidated by this Department. List "b" contains the names of corporations which have been liquidated by receivers appointed prior to the enactment of section 63 by whom balances consisting of unclaimed dividends were turned over to the Department from time to time by orders of the courts which had appointed such receivers. Opposite the names of the respective corporations are set forth the amounts of the funds. Payments of unclaimed dividends included in these funds are being made from time to time as the identity of each person entitled is established.

In October, 1917, several of the funds were invested in United States Government bonds of the second issue, commonly known as "Second Liberty Loan Bonds" pursuant to permission and authority granted to me by the courts having jurisdiction of the funds. The funds which have not been so invested are on deposit in banks and have been earning interest except in a few cases in which the amounts are too small to earn interest.

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Year Ending December 31, 1920.**

**LIQUIDATIONS.**

The year 1920 was marked by the distribution of funds and the closing of proceedings theretofore begun under section 63 of the Insurance Law of the State rather than by the institution of new proceedings. The total amount of money distributed during the year was \$732,090.79 to 53,174 persons. Only three proceedings were instituted under the statute during the year while six, instituted prior to the year 1920, were closed and distributions were made in two proceedings which could not be finally closed within the year.

The result obtained from the institution of the three proceedings during the year, as well as those obtained from the completion of the six proceedings and the partial completion of several others theretofore begun, again justify, as stated in my report to the Legislature of 1920, the wisdom of the Legislature in providing a procedure for the expeditious acquisition by the Superintendent of Insurance of the assets and business of a delinquent insurer to the end that the insuring public may not be subjected to the hazard of an insurer continuing in business when it cannot or will not be able in the ordinary course of business to meet its policy obligations at maturity. In such cases speed and expert knowledge of the business is essential for the protection of policyholders, creditors and stockholders. When it becomes common knowledge that a company is in a hazardous condition the policyholders begin to withdraw and the slightest delay in taking possession for liquidation or for reorganization invariably results in serious detriment in many ways. Without regard to merit, delay or litigation of



any kind or a stay of proceedings resulting in delay will cause policyholders to wonder what will be the ultimate outcome of the delay affecting a matter so important in their daily lives as their insurance. Their confidence is shaken. Those who can obtain insurance elsewhere withdraw. The impaired risks which will not be accepted by other insurers remain. This results in throwing upon the delinquent company, or the accepting company in cases of reorganization, an adverse selection which is dangerous.

In case of the Supreme Council of the Catholic Mutual Benefit Association, against which a proceeding was commenced in May, 1920, it was necessary to move with speed for 20,000 had lapsed in one month and suddenly precipitated the association into insolvency. The association had been in business for twenty-seven years and a great many of its members had become impaired risks and could not obtain life insurance from any other insurer. Prompt action was required to conserve the assets for beneficiaries of deceased members who held unpaid claims against the association and to provide adequate insurance protection for the living members until those who desired could secure insurance in a solvent company. Under section 63 the remedy was found. An order was obtained directing the association to show cause on one day's notice why it should not be liquidated and why the insurance of its living members should not be transferred to a solvent company. On the return of such order the court directed that the association be liquidated and that all outstanding certificates, contracts and obligations should cease at midnight of May 15, 1920, and that as a part of the liquidation, the liquidator was authorized to execute a contract with the American Insurance Union whereby the latter was to accept as beneficial members and to insure and continue without medical, physical or other examination of any kind, the insurance of every beneficial member of the delinquent association from the time fixed by the court order for the expira-



tion of the certificates of the Supreme Council until June 1, 1920, and thereafter the American Insurance Union was to continue the insurance of every beneficial member who accepted the contract and who agreed to pay and to continue to pay assessments upon the table of rates set forth therein. A contract was immediately executed and sent to all members of the association together with a notice of the liquidation order. This procedure gave the members fifteen days, during which they were protected by insurance in a solvent company and in which to receive the notice and to determine whether they desired to accept insurance with the American Insurance Union or seek protection elsewhere. I am informed that a majority of the members accepted the contract and continued their insurance with the American Insurance Union upon an adequate rate basis. In addition to these benefits the contract provided that for twelve months from the effective date thereof the American Insurance Union would pay to the liquidator for the business of the Supreme Council thirty per centum of the amount received from the members who accepted the contract over and above death losses and expenses. From this source the sum of \$40,076.60 has been received by the liquidator for five months of the contract year. This sum will be distributed to beneficiaries of deceased members. Before the close of the year I filed a report with the Supreme Court recommending the payment of a dividend of forty per centum to creditors of the association. Without the rapid and elastic procedure provided by Section 63, these beneficent and advantageous results could not have been accomplished for the people affected by the failure of this association. The same procedure was pursued with similar advantageous results with reference to the Catholic Relief and Beneficiary Association. The results obtained in these two cases are similar to the results obtained in the proceeding instituted against the Polish Union of America, the details of which are given in my report last year to the legislature for the year 1919. The

closing of the liquidation of the Polish Union of America during the year 1919 was prevented by harassing litigation which was continued during the year 1920 and again prevented the closing of the proceeding, but the litigation finally reached the Court of Appeals during the year and the Court denied the application of appellants for leave to appeal from the order of the Appellate Division, Fourth Department, and unanimously affirmed the orders of the lower court sustaining in all respects the proceedings taken by me under section 63, thus approving the procedure which was taken in these cases.

The results obtained from the liquidation of the Seneca Fire Insurance Company, a stock fire insurance company, the details of which appear in my report last year, coupled with the fact that, before the close of the year 1920, a report was filed with the court recommending the payment of a dividend of ninety per centum to creditors, show that the procedure provided by the statute and followed in these cases is not confined to fraternal societies.

The liquidation of the Casualty Company of America, the affairs of which were seriously complicated when possession was taken, was before the close of the year brought to a status which will permit of the payment of a dividend during the early part of the year 1921. The labor and litigation required to untangle the affairs of the company to a degree which will permit of the payment of a first dividend have been heavy, and much remains to be done before the proceeding can be closed. The company had deposits in the States of Massachusetts, Ohio and Texas. Litigation to recover these deposits is still pending. During the year an ancillary receiver of the company was appointed in the State of Pennsylvania over my objection. Other States of the Union have not adopted the rule of comity which our Court of Appeals has laid down in such cases. (*Martyne v. American Union Fire Insurance Co. of Philadelphia*, 216 N. Y., 183.) This

is to be regretted, in view of the economical results obtained from the proceedings provided by our statute.

Proceedings have been instituted under the statute since its enactment in 1909 against seventy-nine corporations.

The names of all of the corporations completely liquidated, and the particulars in relation thereto, including, among other things, the date of the commencement and of the completion of each proceeding, the amount of the assets and liabilities of each of such corporations, respectively, and the dividends paid to the creditors, stockholders and members, are set forth in Part 1 of Table E herewith submitted.

The names of all the corporations, the liquidations of which have not been completed, with particulars, are set forth in Part 2 of said Table E.

Part 3 of said Table E is a list of corporations which have been liquidated on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders and members, and the amounts of such funds. List "a" contains the names of corporations which have been liquidated by this Department. List "b" contains the names of corporations liquidated by receivers appointed prior to the enactment of section 63, by whom balances consisting of unclaimed dividends were turned over to the Department from time to time by orders of the courts appointing such receivers. Opposite the names of the respective corporations are set forth the amounts of the funds. Payments of unclaimed dividends included in these funds are being made from time to time as the identity of each person entitled is established.

Several of the funds in October, 1917, were invested in United States Government Bonds of the second issue, commonly known as "Second Liberty Loan Bonds," pursuant to permission and authority granted to me by the courts having jurisdiction of the funds. The funds which have not been so invested are on de-

posit in the banks and have been earning interest, except in a few cases in which the amounts are too small to earn interest.

The expenses of liquidation in each proceeding appear in Parts 1 and 2 of Table E, hereinbefore mentioned, and the low ratio of expenses shows that section 63 affords the people of the State an economical procedure for the distribution of the estates of insurance companies, and this method should be expressly made exclusive of all other methods for liquidating insurance companies.

**63rd Annual Report of the Superintendent of Insurance,  
State of New York, of Business for Calendar  
Year Ending December 31, 1921.**

**LIQUIDATIONS.**

Through the administration of section 63 of the Insurance Law (the section commonly known as the liquidation law), satisfactory results were again achieved for policyholders, creditors and the public during the year 1921.

The speedy and elastic procedure provided by the liquidation law by which the superintendent of insurance may, summarily and upon short notice, take possession and control of a delinquent insurer, for the protection of the public, policyholders, creditors and stockholders, was effectually employed twice at the beginning of the year, when two large marine insurance companies failed. The companies wrote both marine and automobile casualty and fire coverage in many states and several foreign countries and had in force a large number of policies. Heavy losses on both kinds of coverage coupled with the loss of deposits in a bank which became bankrupt and the contemporaneous bankruptcies of several corporations, stock of which was held by the insurance companies as collateral to secure their deposits in the bank, were the contributing causes which together precipitated the failure of the insurance companies. With the deposits gone and the collateral unavailable, the companies were unable to pay all debts in full. Immediate action was necessary to protect the public, policyholders, creditors and stockholders. The superintendent made two applications to the Supreme Court, New York County, at nine o'clock in the morning, for orders to show cause, which were granted returnable at one o'clock in the afternoon. On the return of the orders to show cause, and after full hearings before the court,

orders were made which directed the superintendent of insurance forthwith to take possession of the property and liquidate the affairs of the companies pursuant to section 63 of the Insurance Law. Within five hours after the orders to show cause were granted, all court proceedings required by the statute had been completed and the superintendent of insurance was in possession of the business of the delinquent insurers and was sending to the policyholders, agents of the companies, brokers and the public, notice that the policies of the companies no longer gave full protection; that no further policies would be written; that all policyholders should replace their impaired policies with policies of solvent companies, and that all policies would cease when replaced, or in any event at the expiration of five days. By this quick, practical and business-like procedure, made possible by the statute, policyholders, creditors and the public were protected. The receipt by policyholders, while still covered by such insurance protection as their impaired policies afforded, of speedy notice of the impairment of their insurance, gave them opportunity to get other insurance before sustaining losses, before additional losses accumulated further to impair their policies and before such protection as they had, ceased to exist. The interests of the creditors in the assets of the companies were conserved by immediate termination of all liability. Termination of all liability and the replacement of policies with policies of solvent companies prevented the accrual of other claims and the rights of creditors in the assets were established. Undoubtedly, the swift procedure authorized by the statute resulted in substantial savings for many policyholders who would have sustained losses if a period of time so long as that required for a cumbersome court action or proceeding had elapsed before relief could have been given.

Similar effective results were accomplished later in the year for many other policyholders by the prompt acquisition by the superintendent of insurance of the Serb Federaltion Sloga (a

fraternal society which did business in many states), and in taking possession of the United States Mutual Automobile Fire Insurance Company and the United States Mutual Automobile Casualty Company. Without the rapid and elastic procedure provided by the statute these results could not have been accomplished.

To preserve the rapid procedure essential when an insurer is found to be delinquent and to prevent blockage of rapid procedure in any case, the law should be amended in two particulars.

First, grounds on which application may be made for a court order should be added to the statute so that the superintendent of insurance may prevent officers, directors, stockholders or others from resorting to the use of voluntary liquidation or dissolution proceedings or receiverships, as a means to end the existence of an insurer which should be continued for the benefit of policyholders or to accomplish selfish ends such as to secure employment or fees for themselves or others at the expense of policyholders, creditors, stockholders and the public. Such a safeguard can be incorporated in the law by an amendment providing that the superintendent may make an application whenever any domestic corporation commences voluntary liquidation or dissolution or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs or to dissolve its corporate charter or to procure the appointment of a receiver, custodian or sequestrator under any law except as provided in the Insurance Law of the State; and whenever an application is made for the appointment of a receiver, custodian or sequestrator of the corporation or of its property, or one is appointed by a federal court or when such appointment is imminent.

Secondly, the statute should provide the manner of service of the order to show cause and papers in each class of cases. As the law stands at the present time, service of the order to show cause and the papers on which it is granted is required to be made in the manner that a summons is served upon a domestic corporation



as provided by section 431 of the Code of Civil Procedure. Obviously this provision cannot be complied with in serving all entities subject to the statute. By providing specifically the officers or persons who shall be served in each class of cases to which the statute is applicable, all questions relating to the manner of service and resultant delay which would arise from issues which might be raised on such questions, can be avoided.

A bill containing the amendments recommended has been passed by the Senate and Assembly and is in the possession of the Governor awaiting his approval.

The results accomplished during the year 1921 in conducting proceedings which were instituted prior to the year, were highly satisfactory. Final distributions were made in four proceedings which were closed. Partial distributions were made in thirteen proceedings. The total amount of cash distributed was \$719,354.61 to 4,026 persons.

Proceedings have been instituted under the liquidation law since its enactment in 1909 against eighty-four corporations. The names of all the corporations completely liquidated, the particulars in relation thereto, including, among other things, the date of the commencement and of the completion of each proceeding, the amount of the assets and liabilities of each of such corporations respectively, and the dividends paid to the creditors, stockholders and members, are set forth in Part 1 of Table E.

The names of all the corporations, the liquidations of which have not been completed, with particulars, are set forth in Part 2 of said Table E.

Part 3 of said Table E is a list of corporations, which have been liquidated, on account of which are held funds consisting of unclaimed dividends apportioned to creditors, stockholders and members and the amounts of such funds. List "a" contains the names of corporations which have been liquidated by this department. List "b" contains the names of corporations liquidated by

receivers appointed prior to the enactment of section 63 by whom balances consisting of unclaimed dividends were turned over to the department from time to time by orders of the courts appointing such receivers. Opposite the names of the respective corporations are set forth the amounts of the funds. Payments of unclaimed dividends included in these funds are being made from time to time as the identity of each person entitled is established.

Several of the funds in October, 1917, were invested in United States Government bonds of the second issue, commonly known as "Second Liberty Loan Bonds," pursuant to permission and authority granted to the superintendent of insurance by the courts having jurisdiction of the funds. The funds which have not been so invested are on deposit in banks and have been earning interest except in a few cases in which the amounts are too small to earn interest.